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GOSSIP ABOUT LEGAL HISTORY: UNPUBLISHED LETTERS OF MAITLAND AND AMES.

WHEN, during a recent visit at Harvard University, I called upon my friend, Mrs. James Barr Ames, in her Cambridge home, she most generously gave me the originals of some letters which had been written to her husband by Maitland, Brunner, and other legal scholars. On examining the letters, I found that the bundle contained six letters written to Ames by Maitland, and also the original of one long letter which Ames had written to Maitland, a letter which for some reason, possibly the refreshing of memory, appears to have been returned to the writer.

It was not surprising to find that Maitland and Ames had been in correspondence, for from my personal acquaintance with them both I had long since learned how much each valued the writings and opinions of the other. On one occasion, when I showed to Maitland the list of essays which it was proposed by Dr. Wigmore and his editorial colleagues to republish in the *Select Essays in Anglo-American Legal History*, Maitland scanned it carefully for several minutes and then remarked: "Ames' essays are the best of the lot."

At the end of one of his letters Maitland remarks that "it is pleasant to me to gossip about legal history." Those who had the good fortune of knowing Maitland and Ames personally will recollect vividly the charm and brilliance of the conversation of both of these great scholars when the talk turned upon points in English legal history. These same qualities of their private conversation reappear in their letters. It seemed to me that

the treasure of thought which I found embodied in the seven letters which came so unexpectedly into my possession should some day be transmitted to those who value every word coming from these masters in legal history. I willingly accepted, therefore, Mr. Goodhart's proposal that this correspondence between Maitland and Ames should find a place in the pages of *The Cambridge Law Journal*. I made transcripts of the letters, and showed them to Mr. H. A. L. Fisher, Maitland's literary executor, and to Sir Frederick Pollock, another of Maitland's friends, who stood close beside him during the greater part of his literary career. I am much indebted to Mr. Fisher for his prompt and cordial expression of willingness that Maitland's letters should be published, and to Sir Frederick Pollock for his kindness in making, at my request, a number of valuable suggestions in regard to the footnotes which I proposed to append to the letters. To Mrs. Ames also I am grateful for her ready permission to publish the letter written by her husband.

In one of his letters to me Mr. Fisher remarks: "I have read Maitland's letters with great delight. What exquisite clarity and precision!" Those who peruse the letters which follow these introductory paragraphs will all heartily accept, I am sure, Mr. Fisher's judgment. The letter of Ames also shows similar qualities. Indeed, both Maitland and Ames possessed many qualities of mind and heart in common. It was these characteristics, so familiar to all who knew the men intimately, or who are versed in their published writings, which resulted in their taking places of pre-eminence in the Anglo-American school of legal historians. When the achievements of this school of legal thought are judicially appraised by some competent scholar in the future, these two fellow-workers will be recognized as pioneers in the task of bringing to light the legal ideas of our medieval ancestors. Among the powers which Maitland and Ames possessed in common, in so abundant a degree, was their capacity for prolonged and fruitful research among legal sources, their resolute adherence to the cause of historical truth, their readiness to admit the possibility that another's historical judgment might be sounder than their own, their mastery of the materials which they collected, their broad and sympathetic outlook on the past, their appreciation of the value of historical studies in solving the legal and social problems of the present, and their effective literary presentation of the results of their labours. In personal traits the two scholars were also much alike. They possessed the capacity in a remarkable degree for attracting and preserving friendships; they showed kindliness

even to the chance student who came into their lives for a brief moment; they displayed cheerfulness and courage in the presence of physical ills; they manifested simplicity, candour, and urbanity in all the relations of life. There are other points of character and attainment in which these two great scholars were much alike, but there are also points in which they were very different from each other. The essential thing, however, which one likes to hold in remembrance is that both Maitland and Ames brought to bear upon the problems of scholarship and of life personal and mental characteristics which not only attracted to them the men of their own time, but which will make their names live in the future. Whatever is best in life and in scholarship will always be typified by the activities and attainments of these two remarkable men.

The "gossip about legal history" which the reader will find in the letters which follow is gossip of no usual kind: it is gossip in which the minds of both friends were directed to the ascertainment of the right solution of certain of the more difficult problems concerned with the history of common law actions and of other aspects of our legal past. How accurately the writers of these letters read the minds of our ancestors every reader may judge for himself. Medieval legal ideas were in many respects very different from those of our modern times; rethinking the ideas of the men of the middle age is not easy. It is possible that even masters of historical science like Maitland and Ames failed to grasp correctly in some particulars the mental processes of past generations. Scholars of to-day do not always agree in their judgment as to the ideas which underlie medieval sources of law. From a letter which I have recently received from Sir Frederick Pollock I am permitted to quote a few sentences: "Thanks for the sight of the Maitland-Ames letters. My own notion is that our mediaeval ancestors were more like ourselves—meaning the English Bar of the nineteenth-twentieth centuries—and cared less about having a logical theory of the forms of action than Ames, and for the most part his successors, appear tacitly to assume. That they could not conceive property except under the aspect of the best right of or better *to* possession I have believed and said for a long time. What seems to me a wholly unsolved puzzle at present is not why our ancestors' notions of law were so archaic but how the ideas of classical and even late republican Roman law came to be so modern. We have been (till, say, Holmes wrote *The Common Law*) in the habit of assuming that *dominium*, rights *in rem*, *obligatio*, come by nature, whereas they are highly artificial and refined ideas. Not

to believe you have the advowson till you have grasped the handle of the church door with good witness—that is nature.''

But I must close these introductory remarks, and allow the reader to peruse the letters exchanged between the two friends. Before doing so, however, I wish to place on record my keen sense of personal obligation to my friend, Dr. P. H. Winfield, for his great kindness in completing, at my request, a most agreeable task. Unable myself to finish the editing of the letters for publication, owing to an unexpected absence from Cambridge, Dr. Winfield, with skill and learning, has collated the transcripts of the letters with the originals; and he has also added a few illuminating footnotes, in explanation, for the guidance of the reader. The footnotes contributed by Sir Frederick Pollock are indicated by his initials.

H. D. Hazeltine.

(1) *Maitland to Ames.*

"15 Brookside,
"Cambridge,
"30*th Jan.* 1888.

"Dear Sir,—Professor Thayer has been kind enough to forward to me some notes which you were kind enough to make upon my edition of *Bracton's Note Book*. I am very grateful to you for them, and perhaps I can best show my gratitude by sending a few notes in return, premising, however, that I do not mean them as a reply to your criticisms, which are very just.

"Like you I have been struck by the sudden popularity of actions of trespass, especially of trespass *quare clausum fregit*. There are some rolls from the end of Henry III's reign which are *covered* with actions of this class. The passage in Bracton of which you speak, you will, I think, find on f. 413, and a very curious passage it is:—one must not bring the *quare vi et armis* for a disseisin, seemingly because this puts in issue the *modus et qualitas facti*, *i.e.* the violence, when the *factum* itself, *i.e.* the disseisin, is the real matter in dispute. This seems to us, at least it seems to me, a rather artificial and scholastic objection, and one likely to give way in course of time. What I know of the rolls certainly bears out the impression given by the *Placitorum Abbrev.*, namely, that trespass *qu. cl. fr.* suddenly became a common form of action. I should not be much surprised if this turned out to be the result of an ordinance. All that I meant about outlawry was that the possibility of outlawry made trespass preferable to other civil actions. Where the wrong was

a breach of a close an appeal was inappropriate. I have got in a volume of *Pleas of the Crown* that I am editing for the Selden Society a case from John's reign of an appeal founded on breach of a close, and this is quashed on the ground that *appellum de pratis pastis non pertinet ad coronam domini regis.*[1] The writ of trespass seems a modification of the appeal of felony; the *verba de felonia* are omitted, while the *vi et armis* and the *contra pacem* are retained. Doubtless you are right, however, in saying that the fact that the plaintiff in trespass could get a jury had much to do with the popularity of that form of action; this is well brought out by the description of trespass in the *Statutum Walliae*: 'vix in placito transgressionis evadere poterit reus quin defendat se per patriam.'[2]

"As to uses, I did not mean to imply that they were enforceable, but there seems to me some evidence that already in the thirteenth century the idea had occurred to men that it was sometimes convenient to have as owner one who was bound by good faith to let another enjoy the land. I send you a passage which I copied the other day from a very early manorial roll, in which an attempt is made to evade a rule of the manor that the villein tenements are to be holden only by such as are personally the lord's villeins. Possibly you may care to see it. I know no rolls more interesting than the earliest manorial rolls; they are covered with litigation; I hope that the Selden Society will soon make a selection from them.[3]

"With renewed thanks,

"Believe me,

"Yours very truly,

"F. W. Maitland."

(2) *Maitland to Ames.*

"15 Brookside,

"Cambridge.

"6*th May*, 1888.

"Dear Sir,—I have to thank you for a letter full of interesting remarks, and first let me answer as best I can your question as to the possibility of tracing cases from the Year Books to the Rolls. I shall always be happy to make the attempt to find any case that you may want. I hope always to make some leisure for study at the Record Office, and I enjoy a good hunt. I fear, however, that I know of nobody who takes to such work as to a

[1] Selden Society, vol. 1, p. 14.
[2] *Statutes of the Realm*, i. 66.
[3] It has. Selden Society, vol. 2.

profession: there is not sufficient demand for this. Now if, for example, you wished to discover a pedigree or prove your title to an English peerage, it would be easy to put you into good hands, for there are many professional searchers who are in the habit of going through the rolls in quest of names; but they are not in the habit of serving those who merely want cases of a certain legal class. It is a misfortune that the Year Books so seldom mention names, for this makes it difficult to find the cases on the rolls or to be quite certain that one has found them. Still, in a little time one's eye gets accustomed to looking for cases of a particular kind; *e.g.* the *Ass ven rec* will tell one that it is an assize. I shall always be happy to look for anything that you may want, but I cannot promise to find it. You will see that Mr. Pike in his edition of the Year Books has often been successful in finding the record. Whenever the happy day comes when the Year Books are reprinted the records will have to be used. I think that the Selden Society might do worse than publish a specimen Year Book, in which the record of every important case should be given in full or in abstract.[4] I very much wish that I could train up a few Cambridge men to use the Record Office; but they all believe that they are going to succeed at the Bar.

"I did not mean to imply in my essay on Seisin that a termor ever had the assize. I do not think that he ever had it, though the *Mirror* says that he ought to have it. (I cannot at this moment find that queer book, but I spoke of this in L. Q. R. i. 337.) But as to 'the bare possessor'—meaning thereby one who has no title—surely he had the assize. Suppose that A is the true owner and that B without a shadow of right disseises him—then A has a brief interval allowed him for re-ejectment—but from the very moment of the disseisin B is seised as regards all others, and if X turns him out, then B will have the assize against X. I cannot read Bracton to mean anything else than this—*e.g.* on f. 209 b, line 25: 'Et unde cum tenens disseisitor vel intrusor.' Even against A, B will be protected so soon as a brief interval has elapsed. The end of my discourse will appear some day in the L. Q. R.; it was written last year.[5] I try to show how the courts gradually lost their grasp of the notion that possession as such is to be protected, and allowed defendants in an assize to plead title. But surely to the very last a bare possessor could have recovered in an assize against one who

[4] It has published sixteen such volumes.

[5] Possession for year and day: L. Q. R. v. 253 [F. P.].

pretended no title. Put it that A is the owner, that B without any title turns him out, and that then C without any title turns B out—could not B recover from C? I did not know that this had been disputed, though I must confess that in the eighteenth century when 'the feudal system' was in its prime some of our judges had a notion that 'seisin' implied title. The question did not get raised in modern times, because men had ceased to eject each other without shadow of right, but I should have thought that had it been raised the decision must have been in favour of B against C.

"As regards trespass, I know too little to speak of it in a letter to you—but the impression that I got some years ago from reading the cases was not quite that which they have evidently made upon you. My notion (which very likely may be wrong) was this, that possession, bare possession, had been quite enough for the plaintiff in trespass, but that when under a cloud of fictions trespass (in the form of ejectment) was made to do the duty of a proprietary action, the old principle was for a while confused by the maxim (appropriate only to proprietary actions) that a plaintiff must recover on the strength of his own title and not on the weakness of the defendant's; but then that further reflection set the old principle free again in the form that 'title' is a relative term, and that in the case stated above B has good title *as against C*. However, I submit this to you very diffidently.

"I do not think that the cases of the bare possessor and of the termor can be spoken of in the same sentence. The bare possessor of the thirteenth century has, I think, the assize; the termor has not, because the termor has hitherto been regarded as the freeholder's bailiff, and to eject him is to disseise the freeholder.

"I have just been reading with very great interest your article upon Assumpsit[6]; it is most valuable, and will go far towards settling the question.

"For the references to seisin and disseisin of chattels I am very grateful. I have now a large number of instances beyond those that I originally quoted.

"I am getting on with selections from the early manor rolls. At King's College they have a beautiful set beginning in 1246 which once belonged to the Norman Abbey of Bec. I hope that the book will be interesting. The forms of pleading in the manorial courts are closely similar to the forms which prevailed in the King's courts—except that *secundum consuetudinem manerii* is constantly inserted. Before the end of the thirteenth

[6] *Harvard Law Review*, ii. 1-19.

century, the chief outlines of what, by anticipation, one may call 'copyhold conveyancing' seem to have been drawn.

"I hope that you will not think this letter too long: it is pleasant to me to gossip about legal history.

"Believe me,
"Yours very truly,
"F. W. MAITLAND.

"Prof^r J. B. Ames."

(3) *Maitland to Ames.*

"Downing Coll., Camb.
"14 *Oct^r* 1888.

"DEAR SIR,—Your letter of last August has gone too long without an answer; but a change of house consequent on an appointment to the Downing Professorship has kept me busy, and I have had many manorial rolls in my hands. You say that you have written an essay on the disseisin of chattels. I take in your *Harvard Law Review*, but no number has come for some time past; I must interrogate my publisher about this. I hope that the essay is in print and that I may soon see it, for it will be most interesting to me. I have never been through the cases diligently, but I know the way that the judges of the Y.B. period have of ascribing 'property' to an unlawful taker and even to a thief—and I cannot understand it. It is, of course, easy to say that they confound 'property' with 'possession'—but is such a confusion conceivable? In what sense can a thief have property? I have long been desirous of getting some answer to such questions, and am happy to think that when I have leisure to search the Y.BB. I shall be able to do so under your guidance.

"I have found some interesting rolls of the Court of the Fair of St. Ives (Hunts), temp. Edward I. It professed to administer *lex mercatoria*; many of the cases deal with the sale of goods, and I have even found a case about an obligation payable to bearer (*portatori*). I did not expect such luck as this; I feared that the *lex mercatoria* of the middle ages would always be for us a mere name. I mean to drag in some extracts from these rolls into the next Selden volume[7]—pleading that, though the court was not 'manorial,' still it was 'seignorial,' for it belonged to the Abbot of Ramsey.

"Believe me,
"Yours very truly,
"F. W. MAITLAND."

[7] Selden Society, vol. 2, pp. 132-133, 137, 152.

(4) *Maitland to Ames.*

"The West Lodge,
"Downing College,
"Cambridge,
"3 *May*, 1889.

"My Dear Sir,—I should like to tell you, but hardly can, how much real pleasure I have got out of your Disseisin of Chattels.[8] For a long time past my mind has been flickering round that subject; but I have not had the courage to write about it. Thus some, though by no means all, of your authorities were familiar to me, but I never hoped to see them arrayed in so solid a phalanx. A great deal of what you say I at once accept. In the first place I think it certain that, when once the owner of a chattel had his property reduced to a mere right of action, that right, like all other rights of action, was inalienable. In the second place I think it highly probable that if he bailed the chattel all that was left to him was a right of action, though this rule was modified at a remote time, modified by allowing him in many cases an action against the trespasser, who took the chattel from the bailee. In the third place it seems fairly clear that the owner whose chattel was taken from him by a thief or other trespasser had no alienable right. But there are two conclusions towards which the Year Books seem to lead us, and from which I shrink. The first of these is that the owner who lost a chattel had no action against the finder for its recovery. The second is that the owner whose chattel was taken from him by trespass had no action for recovering it from any bailee or vendee claiming under the trespasser, or from the second trespasser who took it from the first. Now it may be that this was so, and I must confess that the evidence known to me is in your favour. Still I cannot bring myself to believe that all this is the natural outcome of the English substantive law, that it truly expresses the notion that our ancestors had of the ownership of goods. The typical action, one may say, of early English law is the action for the recovery of stolen cattle which have already passed into the second, third, or fourth hand. Positive legislation is necessary to prevent the voucher of an infinite number of warrantors. Glanvill (x. 15) still knows this action, and so does Bracton (f. 150 b), the action for *bona adirata*. Why do we not hear more of it? The answer that occurs to me is—Because it goes on in the local courts. And similarly, when

[8] *Harvard Law Review*, iii. 23-40.

goods have been lost, it is in some court baron that the man of the thirteenth century will sue for them. To deny the owner a recuperatory action against (1) his bailee's vendee or bailee, (2) the trespasser who takes from the bailee, is, as I understand, quite in accordance with the old French and old German law; but I have in vain been reading through books in number for the purpose of finding some refusal of an action against (1) a thief's or trespasser's vendee or bailee [there being no question of market overt], (2) a second thief or second trespasser, (3) a finder or one who claims under a finder. I can't help thinking that the law of the King's courts is only a part of the law, and that the lawyers in those courts, having to do only with the remedies there given, get into a way of speaking about 'property' which really is misleading. I cannot otherwise bring the rule about market overt into harmony with what they say. As to the fact that there was the greatest difficulty in preventing the stolen goods becoming forfeited to the King, I am inclined to regard this rather as a fruit of the King's power than as justified by any of the ordinary rules of law—it was ill arguing with a King.

"Perhaps I ought not to burden you with these loose remarks, especially as I have to confess over and over again that you have the books, at all events the later books, at your back; but I am so interested by your excellent paper that I should much like to know your opinion as to the early history of the very curious state of things that you have expounded:—Is it the natural outcome of very ancient ideas of 'property,' or is it due to the fact that our King's courts begin by administering only a part of the law, which part, however, is in course of time regarded, and indeed actually becomes, the whole, owing to the decadence of the local tribunals. In the former case we have much to teach the Germans that they don't know. So I am asking for more, and have to hope that you will not think me impertinent for so doing.

"A book that has taught me a great deal is *Jobbé-Duval on Revendication des Meubles*, Paris, 1880. If you have not yet seen it, you will, I think, enjoy it.

"With regard to what you say about trespass, I can add this—that the writ of trespass does not appear in MS. *Registra Brevium* of Henry III's reign, nor even in all the *Registra* of Edward I's. I have little doubt that you are right in thinking that it became a writ of course late in the former reign. I have sent some tidings of these early Registers to Professor Thayer, thinking it just possible that your Harvard magazine would print my

notes[9]; but I don't want to blight its promise or check its circulation.

"I am delighted in particular by the part of your paper that deals with 'replevin'; much of it is new to me, but it accords well with the little that I knew.

"Is it altogether useless to express a hope that you may think the old Cambridge worth a visit?

"Believe me,

"Yours very truly,

"F. W. MAITLAND.

"Prof[r] J. B. Ames."

(5) *Ames to Maitland.*

"Harvard Law School.

"27 *Nov.* 1889.

"MY DEAR SIR,—It was a very great satisfaction to me to receive the letter in which you wrote so pleasantly of my essay on the Disseisin of Chattels.

"My first impulse was to send you an immediate reply. But on reflection it seemed better to take time to consider some of your suggestions, especially as I must in any case review the early sources in preparing my Lectures on the History of Tort and Contract. This review I have at last finished, and while the subject is still fresh I venture to inflict upon you some of my conclusions.

"You speak of your reluctance to accept the view that 'the owner who lost a chattel had no action against the finder for its recovery,' and also the doctrine that 'the owner whose chattel was taken from him by trespass had no action for recovering it from any bailee or vendee claiming under the trespasser, or from the second trespasser who took it from the first.'

"I am sorry if I gave you the impression that I entertained either of these views, for nothing was further from my intention. The *Anefangsklage*, or, as it was known in England, the appeal of larceny (or robbery), was allowed against the finder who set up for himself, and against one who received from or took from a trespasser. In a word, whenever the plaintiff lost possession without his consent. But before going further with this let me say a word upon the old notion of property.

"The fact, universally admitted, that a bailor had originally no remedy against anyone but his bailee seems to show clearly

[9] They were printed in *Harvard Law Review*, iii. 97-115, 167-179, 212-225.

that the modern notion of property, *i.e.* of a right *in rem*, was altogether foreign to the ideas of our ancestors. Accordingly all attempts to find in the *Anefangsklage* the analogue of the Roman *Rei Vindicatio* appear to me futile. The *Anefangsklage* was essentially a criminal proceeding. No one can doubt this of the English appeal. The restitution of the 'mainour' was incidental. In the main I agree with Paul London, with whom this idea has formed the principal motive of his very able book on the *Anefangsklage*.[1] He suggests that the possession of the chattel is principally significant as a *leibliche Beweisung* depriving the possessor of his defence by bare denial, and compelling him to account for his possession as by original production, producing his warrantor and the like.

"His description of the vouching to warranty as a continuation of the trail in pursuit of the thief is a masterly stroke, and is pointedly confirmed by Seld. Soc. Vol. I. p. 192. The thief being found and the chattel being at hand, nothing is more natural than its return to the successful plaintiff.[2]

"This criminal proceeding was for a long time the only mode of recovering a lost or stolen chattel. In England it continued the only remedy until the action of Detinue was allowed against a finder, and it would seem that long before that the appeal had practically been superseded by trespass. Hence the doctrine that a disseisor of a chattel got an absolute title.

"The passage you cite from Bracton, 150 b, relating to the action for *bona adirata*, I must admit has torn my soul with anguish. But I think now its power to trouble is gone I should be especially glad to know how what follows strikes you.

"One who had lost possession of his chattel without his consent could upon finding it count against the possessor in the first instance as having in his hands his *bona adirata*, or he might charge him with theft—'possit *ab initio* agere civiliter vel criminaliter.' If the defendant complied with the demand, well and good. Plaintiff was thereby able 'consequi rem suam quamvis furatam.' If, on the other hand, the defendant did not comply with the demand in court 'si . . . in hoc ei non obtemperaverit,' the civil proceeding came to an end. If plaintiff chose to proceed further he must sue his appeal—'petere eam ut furatam . . . et dicere quod ille . . . latro est.' See also 2 Br. N. B. pl. 824. Trespass afterwards became concurrent

[1] *Die Anefangsklage in ihrer Ursprünglichen Bedeutung* (Breslau, 1886).

[2] All the material authorities (I believe) about the position of a finder are collected in R. S. Wright's part of *Pollock & Wright on Possession* (1888). It is incredible that a "pure" finder, *i.e.* without clue to the true owner, should ever have been deemed a trespasser [F. P.].

with the appeal in these cases. See 1 Nich. Britt. 57, 68, 215-216. The analogy between the action for *bona adirata* and replevin will at once occur to you. The defendant's claim of right or disseisin in each case bars the further prosecution of the action. Plaintiff must in each case resort to the appeal or trespass.

"If you will pardon my rambling, I should like to suggest here that the doctrine of trespass *ab initio* may well have originated in this substitution of trespass for the other actions. In both cases the possessor acquired, or was treated as acquiring, possession by authority of law, *i.e.* by distress or finding. The original taking was lawful, but became unlawful by the subsequent withholding under a claim of right. There was no question of trespass where there was a bailment. Thus the distinction grew up that if def^{t} came to the goods by authority of law he became by its abuse a trespasser *ab initio*, but not if he came to the possession by authority of the plaintiff. This distinction then extended to trespass *quare clausum fregit*.

"The notion of trespass against a finder at length disappeared, but there are comparatively modern traces of it, *e.g.* 33 H. VI, 26-12, *per* Prisot, C.J.: 'In your case [of goods lost] you shall notify the finder and demand their surrender, and if he refuses, you shall have an action of trespass against him; for by the finding he did no wrong but the tort began with the detention after notice'; 2 Rich. III, 15-39: 'Note . . . it was said by some that if one loses his goods and another finds them, the loser may have a writ of trespass if he will or a writ of detinue' *ad finem*. In *East* v. *Newman*, Goldsb. 152, pl. 79, a judgment in trover was given for the plaintiff on a special verdict finding a loss and finding and demand and refusal, Fenner, J., giving as a reason that 'trespass would lie.' About twenty years later, Coke, in *Isaac* v. *Clark*,[3] 1 Roll. R. 130, referring to *East* v. *Newman*, said 'the reason of those who held the refusal to be a conversion was that he came to the goods by finding, and the denial of them afterwards made him a trespasser *ab initio*, which cannot be law, this being only a non-feasance.'[4] Coke's view finally prevailed. A curious history if I am right. The founder of the family turned out of doors!

"The action for *bona adirata* in its original form may be traced for some time, *e.g.* 2 Br. N. B. pl. 824, 1294 Y.B. 21 & 22 Edw. I, 467, and above all in a most interesting precedent of count in *Novae Narrationes*, fol. 15 b,[5] 'De cheval dedit.' I

[3] *Isack* v. *Clarke*. [4] Page 131, *sub fin.* [5] 65 b in Richard Tottell's ed. 1561.

think you will agree that Detinue *per inventionem* was fashioned directly from this count. See the precedent in Lib. Int. and in *Kettle* v. *Bromsall*, Willes, 118. And trover is, of course, Detinue *per inventionem* with the addition of the averment of conversion. Just when Detinue *per inventionem* came in I have not yet been able to discover. I have found nothing earlier than Scrope's remark in 2 Edw. III, 2-5: 'If you had found a charter in the way, I should have my recovery by *praecipe quod reddat*.'

"That an appeal would lie against a vendee or bailee of a thief or trespasser is shown by the mere fact of the practice of vouching to warranty. See 2 Br. N. B. pl. 824; 3 Br. N. B. pl. 1435. 4 H. VII, 5-1, 13 Edw. IV, 3-7, and Keilw. 160, show that the appeal could be maintained against the second thief or trespasser. These cases, I take it, are very ancient law.

"I am not quite sure that I get the force of what you say about 'market overt.' In early times, as I understand the matter, purchase in market overt simply relieved the appellee from the charge of crime, but he must surrender the chattel. This, as London suggests, may have been a relaxation of the rigor of the law which at a still earlier time may have treated such a purchaser as a thief, since he could produce no warrantor. Even in modern times purchase in market overt does not confer absolute title. If the appellor exercised due diligence and convicted the thief, he was entitled to restitution from the chance possessor. And afterwards the evidence given by the original owner on indictment gave him the same right after conviction. And this, I believe, is English law to-day.

"I must apologise for the length of this document. My excuse is that it is a great pleasure to talk over these matters with one of the very few experts in the world.

"I wish I could look forward to meeting you in person. I cannot hope soon to cross the water. But you would be welcomed by many here, but by no one more cordially than by

"Yours very truly,

"James Barr Ames."

(6) *Maitland to Ames.*

"The West Lodge,
"Downing College,
"Cambridge.
"22 *March*, 1890.

"Dear Professor Ames,—I am exceedingly grateful to you for a copy of the number of the *Harvard Law Review* which

contains 'Disseisin of Chattels No. 2'[6]; for though I take in the Review, yet I shall be particularly glad of a second copy of this number to lend about. Already I have been strongly recommending your earlier article to the best of our students. I am deeply interested in your speculations, especially in those which relate to the action of the Statute of Limitations in complex cases. I am delighted to read what you say of *Doe* v. *Barnard* (p. 325). I thought that Pollock's attempt to save some part of that unfortunate case was desperate.[7]

"I am still ruminating over your first article, I mean the first on Disseisin. There are some things in it which perplex me—not that your opinions are ever obscure—far from it!—but because I cannot fit them in with some of my own beliefs.[8] So much the worse for my beliefs, I dare say. But some day I may ask your Review to let me have a word about the matter; it will be written with great humility.

"I am getting a good deal of evidence together which tends to show that throughout the fourteenth century the local courts were busy in enforcing unwritten, and therefore unsealed, agreements. They are called *convenciones*, but they are of so trivial a kind that I cannot believe them to have been clothed with Latin and parchment and wax. Would this shock you very much? It seems to me that the deed must have been an aristocratic institution quite unsuited to the needs of villani, and that, as older 'forms' became obsolete, the local courts may have given up form altogether and required no more than suit.[9] The action on a *convencio* is apparently kept quite distinct from the action of debt.

"With one more word of thanks,

"Believe me,

"Yours very truly,

"F. W. Maitland."

(7) *Maitland to Ames.*

"The West Lodge,

"Downing College,

"Cambridge.

"*23rd March*, 1890.

"Dear Mr. Ames,—You will, I hope, understand that a letter which I wrote a week ago—I have some confused notion that

[6] *Harvard Law Review*, iii. 313-328.

[7] Desperate in reason, but it was first made by Mellor, J. (in a Court of only co-ordinate authority), in *Asher* v. *Whitlock*. See now Lord Macnaghten in judgment of Judicial Committee: *Perry* v. *Clissold*, [1907] A. C. 79, 80 [F. P.].

[8] Cf. P. & M. ii. 168, n. 2.

[9] *Ibid.* 222-224.

under the influence of a newly-acquired almanac I misdated it—was not an answer to your delightful letter of 6th March, 1890. I call it delightful, for not only has it taught me a great deal, but also it has removed the only cause of quarrel that I had with you. I had got it into my head that you were carrying your denial of ownership to the point of holding that within historic times if B stole, or otherwise by trespass took, A's horse and sold it to C, then A had no means of getting the horse from C, but could merely appeal B of larceny or sue him in trespass. This doubtless was my stupidity, and I ought not even in thought to have charged you with neglect of the vast mass of authority that we have as to the voucher of warrantors. I now see that you have carefully considered this subject, and I am inclined to agree with your conclusions. Probably in cent. XII, and even in cent. XIII, the advice that one ought to give to A is—'Bring what is generally known as an *actio furti* against C. You can begin without words of felony, and possibly C will give in. If he does not, then you will have to add words of felony and may be obliged to fight C or C's vouchee.' I have just read through once more Bracton's account of the *actio furti*, and I think that you have put the right interpretation on it, *i.e.* that if C sets up title then A must *agere criminaliter* against him.

"It seems to me that the critical question is, What will happen if A, instead of going to law against C, disseises C of the horse? C, let us say, will thereupon appeal A of larceny. Can A plead his title, or will jurors be justified in swearing that A did not in felony take C's horse? This is the question upon which I cannot find authority. The law about retaking is unfortunately much obscured by the law about waif. I think it very possible that the sphere of self-help was gradually enlarged as time went on—this certainly was the case as regards land—but I should like to be able to trace the different stages.[1]

"The laws, English and foreign, which set limits to the voucher of warrantors are very interesting. I dare say you know that in the passage in which Glanvill speaks of this matter (x. 15) there is very possibly a misreading: 'Sed nunquid warrantus poterit warrantum in curia vocare? Quod si sic est ad *quotum* warrantum erit standum.' Some MS. have *quartum* instead of *quotum*, so that the rule looks like a repetition of that which occurs in Canute, II, 24, § 2 (Schmid): 'tunc licet[2] inde ter advocari et quarta vice proprietur aut reddatur ei cujus erit.' I am now looking to this quarter as the hopeful quarter for the

[1] P. & M. ii., 164-170.

[2] *Liceat* in the text. So, too, Liebermann, *Gesetze der Angelsachsen*, i. 327.

solution of a problem which has much vexed me, viz. the limitation (before Stat. Marlbridge) of the writs of entry to 'the degrees' of *per* and *per* and *cui*.[3] In the Norman *Custumal*, c. ci (de Gruchy, p. 242), I find a limitation of warranty in an action for land 'tertius autem vocatur ad garantum non potest quartum vocare, quia sic contingeret utra quartam in defensione personam querelam protendere.' I have some hope that here also land law and chattel law may help to explain each other. Meanwhile I watch anxiously for every word you say. I have been plunged for some months past in a big job. Pollock and I had a hope of turning out a historical book, but I am not sure now that he will be able to give his time, and if that be so I shall hardly get very much done in my lifetime. However, I have set to work on the more public side of the law of cent. XII and XIII, and am struggling with tenures and scutages and such like. Leaving the constitutional importance of these matters to Stubbs and others, I still find that there is much of legal interest to be discovered about them. Some day I hope to get free of tenures and villanage and so on, and to tackle the pure private law of ownership, possession, &c., and then I shall value every word of the Disseisin of Chattels. I hope that this time may come; but have my doubts—for the topic of 'Jurisdiction' stares me in the face, and looks even more threatening than 'Land Tenure.' However, I am very glad to find that I was stupid enough to misunderstand your view, and that I can make my submission.

"I have just made acquaintance with a book that will, I think, interest you, viz. vol. 1 of *Records of the Borough of Nottingham*, published by the municipal corporation (Quaritch, 1882).[4] It has some actions of 'covenant' from cent. XIV, which suggest to me that in the Court of Nottingham *conventio* did not imply writing, *e.g.* (p. 150) in 1352 there is a very curious action on a wager—in form 'debt.' J. D complains that H. D detains 20s. for that, whereas it was agreed (*conventum*) between them that they should ride together from N. to C. and back, so that the one who came in last should pay the other 20s.; nevertheless H. D refused to fulfil the said *conventio*, and of this J. D produces suit. H. D says 'nullum talem conventionem fecit,' and waged his law. So, p. 159 (1355), breach of a *conventio* to carry water for a year; p. 161, breach of a *conventio* to make a pyx. I think that you will find several things in this book to your purpose; for the present I must leave

[3] Cf. P. & M. ii. 70-71.

[4] *Ibid.* 222, n. 2.

it alone, and go back to the cartularies. I wish that they would give me more mortgages and fewer miracles, but one must take the bad with the good.

"With many thanks for your kind explanations, and an assurance that your letter goes into my most sacred drawer to be read hereafter from time to time,

"Believe me,

"Yours very truly,

"F. W. Maitland."

ENGLISH PRIVATE LAW, 1870—1920.[1]

THE foundation of the Société de Législation Comparée, whose jubilee we are now celebrating, preceded by a few years, as it happened, the opening of a new epoch in the history of English law.

The Judicature Act of 1873, brought into force after considerable modification in 1875, made the first systematic change in the structure and jurisdiction of our superior courts since the reign of Edward I. It collected in one Supreme Court, with a uniform though not too rigid procedure, the several jurisdictions and powers that had been exercised by the ancient Courts of Queen's Bench, Common Pleas and Exchequer at Westminster, the Court of Chancery, of mediaeval origin, but settled in its modern form only since the seventeenth century, and the Courts of Admiralty and Probate, the former ancient, the latter (as it then stood) quite modern, and both derived from sources outside the general law of England. Yet it would be wrong to call the change revolutionary. Rather, it established after many days a scheme of justice uniformly administered under royal authority, quite conformable in substance to the ideals of the great constructive lawyers who laid the foundations in the thirteenth century.

It would be superfluous to give any account here of our existing judicial institutions. Our late colleague the Comte de Franqueville provided full and accurate information for French readers in their own language[2]; a short exposition which may be considered authoritative was contributed by Lord Bowen to a composite book published in 1887 in commemoration of Queen Victoria's jubilee[3]; and F. W. Maitland's historical article on English law in the *Encyclopædia Britannica*[4] is no less classical. For the present purpose it is enough to note that the removal of

[1] This article first appeared in French (the excellent translation being the work of Mademoiselle Lion, of the Paris Bar) in *Les transformations de droit dans les principaux pays depuis cinquante ans. Livre de la cinquantenaire de la Société de Législation Comparée*, Paris, 1923, vol. 2.

[2] *Le système judiciaire de la Grande-Bretagne*, Paris, 1893. His diligent research and exact statement are not only extraordinary for a foreign student but would have done credit to any learned Englishman.

[3] *The Reign of Queen Victoria*, Lond. 1887, vol. i., p. 281.

[4] 11th ed., vol. ix., p. 600.

technical restrictions on jurisdiction, and the contact, as judicial colleagues or forensic adversaries, of men whose training and practice were formerly confined to their own special (sometimes narrowly special) branches, were important, perhaps foremost, among the influences that contributed to a wider and more liberal treatment of substantive juridical problems. Not that common sense had been wanting to the judges of England before the last quarter of the nineteenth century. It had already done admirable work in the directions where it had reasonably free scope, especially in the definition and expansion of commercial law; but it had been constantly hampered in other directions by the artificial divisions and limitations which the Judicature Act swept away.

At the same time profound alterations were taking place in the groundwork of economic and social doctrine which is necessarily presupposed in the application of legal categories to novel facts. Down to the middle of the nineteenth century the prevailing theories were individualist, and competition, unregulated and unlimited, passed for the infallible governing principle of civilized industry. Such, in the main, were the ideas of the school of "philosophic Radicals" whose disciples were in power for the generation succeeding the reforms of 1832. As they reigned all but unchallenged in the market-place and the senate, they were likewise potent in the Courts. It was accepted as almost an axiomatic principle that all human relations were to be expressed as far as possible in terms of some contract—a contract in which the parties were assumed without any consideration of the facts to be always free and bargaining on equal terms. Maine's description of modern society as moving from status to contract is of the date when the triumph of this doctrine seemed most complete. Its decline from about 1870 to the present time has been set forth, with more regret than I can myself spare for it, in my friend Professor Dicey's learned and instructive *Law and Public Opinion in England during the Nineteenth Century*.[5] A careful student might infer the triumph and the decline alike from perusal of our law reports alone. Some Judges, as might be expected, held out longer than others against the invading tide of habits of thought which they had been accustomed to regard as contrary to our English constitutional principles of liberty.

I may add that in the middle period of Queen Victoria's reign the superior courts were exceptionally strong. Blackburn in

[5] 2nd ed., Lond. 1914.

the Queen's Bench, Willes in the Common Pleas, Bramwell in the Exchequer, Cairns and somewhat later Jessel and James in the Court of Chancery, were great lawyers and men of solid sense. Their work, very little affected for better or worse by legislation, was a necessary preparation for the progress of which I now have to speak.

Within the compass of the present paper it is impossible to give a full and critical account of either judicial or legislative changes. To do this would require the writing of a book, and rather a large book. All that can be done here is to indicate the tendencies that have been at work in the field of English private law and the general nature of the results.

In the region of jurisprudence concerning personal condition and family relations one reform stands out prominently—the emancipation of married women's property. Before 1870, and in the absence of the skilled precautions to be presently mentioned, whatever movable property a woman had at the time of her marriage became her husband's absolutely, or at any rate came under his disposal (except that her "paraphernalia," that is, objects of personal attire and ornament, could not be taken for his debts or dealt with by his will), while her immovables were subject, in various degrees according to the refinements of English property law, to his interference in her lifetime and possible charges after her death, and she could not alienate them without his concurrence.[6] It will not seem credible that such a law was in operation in a civilized country within the remembrance of middle-aged men; and in fact it was not allowed to operate, in any normal circumstances, when there was enough property in question to warrant the employment of skilled advisers and the enlistment of relatives or intimate friends to be, as trustees, the honorary but responsible guardians of the dispositions to be made. Those dispositions were framed on models which existed in principle, but still wanted finish, in the sixteenth century, had been brought to a high degree of technical efficiency in the eighteenth, and had received a final polish of form in the nineteenth. It is needless to say anything of the elaborate dealings with great family estates in land which afforded a livelihood to many deserving practitioners, but did not enter into the lives of the greater part of even fairly well-to-do people. We may confine ourselves to the type of settlement made by most persons of any substantial means, including the professional classes and

[6] Only a rough statement is practicable: the English categories of "real" and "personal" property do not coincide with those of "movable" and "immovable." Greater exactness would be tedious and of no use for the purpose in hand.

capitalists of all kinds. The intending bridegroom and bride may have chosen one another in the English fashion with very little interference; but the marriage settlement [7] is quite as much the work of family arrangement as marriage itself in France. Portions as nearly equal as may be are put on the table, so to speak, on the parts of the husband and the wife. Often a young husband's contribution has to be potential, in view of his future earnings, and secured as best it can be by life insurance or guaranteed assistance from his parents. All this, however, is matter of economic detail. By an ingenious scheme of legal mechanism, which as a rule works quite smoothly, the husband and wife have the income of their respective fortunes secured to them for their lives, and are authorized to distribute the capital among their children; we pass over the usual provisions for further contingencies, advance of funds from capital and other things which no properly framed settlement omits. Shortly, the result was that among people who could afford marriage settlements the wife was in and about the year 1870 very well protected, assuming that the marriage was in due social form and all things done in order. She was even protected against her own possible improvidence by an anomalous refinement, the clause of "restraint on anticipation" said to have been devised by Lord Thurlow, which forbade her to charge or appropriate in any manner her income not actually received. In the eighteenth century, it may be noted, a gentleman who was not usually a spendthrift or a bad husband might well happen to lose heavily at play and be tempted to solicit his wife to help him out. On the whole the wife who was protected by a marriage settlement was not only secured in the enjoyment of her income but might in some circumstances be in a position, with or without her husband's collusion, to commit frauds with impunity. Minors had and still have a like privilege as a simpler consequence of their disability to bind themselves by contract, subject to certain exceptions allowed in their own interest. On the other hand married women below the standing of the people who habitually made settlements had no protection at all for their earnings or acquisitions of any kind.[8]

In the period under review the law was radically amended by

[7] Approximately equivalent to *contrat de mariage*: observe that in English "contract of marriage" may mean marriage itself, in so far as it has the nature of a contract, or, less correctly, a promise to marry, but will not translate *contrat de mariage*.

[8] The common law was mitigated by local custom in the City of London, possibly in some other boroughs. I do not know what was the economic importance of this in practice.

a series of enactments (for our Parliament seldom achieves any legal reform at one stroke). The principal Act is of 1882; it superseded earlier and more timid ones of 1870 and 1874, and was supplemented in 1893. At this day every Englishwoman married since 1882 is completely mistress of her own property however acquired, save so far as she has herself bound it by settlement. But, although the need for protecting the wife is removed, the desire to make a secure provision for children remains in full force, and therefore the custom of making settlements on marriage has been very little affected. The form of these instruments, indeed, like that of other private instruments, has been improved by long experience and relieved of superfluous verbiage. It remains to be seen whether the formidable burdens imposed on successions of every kind by recent taxation may not be a more effectual reason for simplification. Minors, as I have already hinted, were always favoured by our common law. The *laissez faire* doctrine of nineteenth-century economists was never supposed to be applicable to persons who had not full legal competence to manage their own affairs. Legal rules as to such persons went their own way; it was a rather tortuous and clumsy way, and the details are of merely domestic interest. So far as there was any governing idea, it was that those who dealt with a minor could be held bound, while he remained free to affirm or repudiate the transaction when he attained full age. But this was subject to a rather vague exception of contracts that were for the minor's benefit, especially for supply of "necessaries," a term extending, in its forensic meaning, far beyond the bare necessaries of life. Practically the result was a chronic and rather sordid conflict between the desire of the Courts to protect "infants"—such is the technical description of minors in our law—and the bias of juries largely drawn from the class of small tradesmen in favour of trading creditors. There was no such bias in favour of money-lenders, but the power of ratification on attaining majority seriously weakened a minor's protection against them. In 1874 this power was cut short by an "Infants Relief Act" so unskilfully framed that it became intelligible only by judicial interpretation. I do not think such a piece of work would be allowed to pass at this day. By the effect of this Act, sharpened by the much later Money-lenders Act, which will be mentioned in another place, it is now such a precarious adventure to lend money to a young man under age that professed money-lenders anxiously disclaim having anything to do with it. Prodigality, however, cannot be abolished by Acts of Parliament; and I leave it to the judgment of my French colleagues whether

the institution of the *conseil de famille* is not more effectual than the less radical methods with which we are so far content in this country.

Lunatics, who are deemed to be under the King's special care, by long usage exercised through a peculiar jurisdiction of the Lord Chancellor, are at common law in a position resembling that of minors. The working law of lunacy has for a long time been statutory, and there have been great improvements both in substance and in the administrative mechanism within the last thirty years. It would not be practicable to explain these here even if they fell within the sphere of private law, which I conceive they do not.

Passing from natural to juridical or "artificial" persons (that is, in our professional vocabulary, not fictitious but technical or in accordance with the rules of legal expression) we find the doctrine of *personnalité morale*, a term for which it is not easy to find a good English equivalent, much improved in both knowledge and precision. Sixteenth-century authority had laid down quite clearly that a corporation, once duly constituted, had certain capacities and attributes which could be diminished only by positive and explicit regulation. In the nineteenth century this was largely forgotten. The corporate societies whose affairs came before the Courts were mostly commercial or industrial companies; the general tendency was to regard them as overgrown partnerships, and their collective unity as mere procedural machinery. It must be remembered that a private firm is not a juridical person in England, though it is in Scotland. Thus it became a common opinion that a corporation has only such capacity as the terms of the Act of Parliament or royal charter which gave it birth have expressly conferred on it. Fortunately this false opinion was discredited a few years before 1870, and the true one put in its place, namely, that we have to inquire in each case or class of cases, the most important class being that of companies formed under the general Companies Act (originally of 1862, re-enacted with consolidation of later amendments in 1908), not what powers have been given but what have been denied. Among text-writers the wrong opinion was encouraged by a crude and superficial acquaintance, derived from old-fashioned civilian writers, with what we now know as the "fiction theory" of corporate personality: not that better knowledge of Continental literature would have done much to correct this at any time before the last quarter of the century. Indeed really learned authors, including some who were familiar with the great European jurists, believed that the fictitious, not merely

"artificial," character of a corporation was definitely accepted by our Courts. I found occasion some years ago to examine this assumption, and succeeded, as I venture to think, in showing that it was unfounded.[9] There is really no tangible authority for it. Blackstone, if he had not any other distinct theory, certainly does not favour this one. The Judges of our fathers' time (younger men than myself would say grandfathers') were in some danger of committing themselves to it, but were happily saved by the tradition of judicial economy which not only restrains our Courts from enunciating general definitions not required for the support of the decision, but denies binding authority to their utterances if ever they are tempted to do so. I can only allude here to the admirable work done by my lamented friend, F. W. Maitland, in introducing English readers to modern Continental thought on this subject, and pay a passing tribute to my less intimately known, but no less sincerely lamented, friend Saleilles. Our jurisprudence is averse to large theoretical views, and has the reputation of being empirical. I do not deny that it has suffered somewhat from this temper; but, on the other hand, it has kept clear, sometimes by a hair's breadth, of mistakes that might well have been disastrous. On the whole, it is better to do without a theory than to tie oneself to a bad one. In practice two questions arise when the validity of a contract or other act in the law purporting to bind a corporation is disputed. Was it within the limits prescribed by the particular constitution of this corporation, special Act of Parliament, charter, memorandum of association under the Companies Act, or as the case may be? If so, was the act done by a duly authorized officer or other agent within the bounds of his authority? Having a very full and elastic doctrine of agency, we can handle these questions without entering on the ultimate problems of corporate personality.

When we turn our attention to the tenure and transfer of property, we find very little change to note as to movables. The Sale of Goods Act of 1893 codified law which was already, with only minute exceptions, settled by constant authority and well known in practice, and otherwise there has been no material innovation. Disposal and conveyance of land, on the other hand, have been largely affected by legislation, and with excellent results. It must be observed that the improvements are, and were intended to be, improvements in mechanism and administration. The fundamental complication

[9] "Has the Common Law received the Fiction Theory of Corporations?" Law Quart. Rev., xxvii, reprinted in *Essays in the Law*, 1922.

and obscurity of our land law, due to complex historical causes, is there still. At this moment a serious attack is for the first time being made upon the substantive law with the official authority of the Lord Chancellor. The Government's Bill is necessarily long, intricate, quite unintelligible to the public at large, and fully intelligible only to a specialist minority of the legal profession. It is under the consideration of a unique committee of experts, on whose report and criticism its chances of complete or partial success will depend to a great extent. How much of this great project will emerge from the regular stages of Parliamentary discussion, and with what modifications, is matter of conjecture.[1] Beyond saying that its leading ideas are bold, ingenious, and logically worked out, no explanation of its method can be given to a reader not already acquainted with the extraordinary and heterogeneous mass of tradition, legislation, and usage which it is designed to reduce to comparative simplicity. We may note, however, that anyone who regards our existing land system as feudal is more than two hundred years out of date. In the course of the sixteenth and seventeenth centuries the forms of mediaeval tenure were converted by the combined skill of counsellors and Judges to the uses of the capitalist landholders who had largely supplanted the old aristocracy. Technical developments of equal audacity and subtlety masked the economic revolution which put the eighteenth-century squires, practically as absolute owners, in the place of the barons and knights formerly bound to the Crown, whether directly or through intermediate lords, in chains of homage and service. This, indeed, should not be news to French scholars, for Emile Boutmy wrote nearly thirty-five years ago: "L'Angleterre a été, avant tous les pays, un pays de propriété libre, de moyenne et de petite tenure. . . . Toute cette évolution des deux derniers siècles, qu'on ne s'y trompe pas, n'a rien à voir avec le système féodal antérieur; elle est l'effet d'une grande entreprise aristocratique, laquelle a fini par provoquer une réaction démocratique, toutes deux entièrement modernes dans leur causes et nouvelles dans leur esprit."[2] The book from which these sentences are taken throws much light on the historical and social groundwork of English landholding.

Few words will suffice to state the general nature of the amendments already effected within recent memory; the details are far too technical to be specified here. Before 1881 all con-

[1] Since this was written it has become law as the Law of Property Act, 1922. Further measures of consolidation and recasting are expected.

[2] *Le Développement de la Constitution et de la Société Politique en Angleterre*, Paris, 1887, pp. 92, 93, 95, 96.

veyances of land contained sundry clauses which experience had settled in practically invariable forms; they were useful and even necessary, but added materially to the length and cost of the documents. The Conveyancing Act of 1881 made it unnecessary to repeat them by enacting that very short phrases (in which verbal correctness is essential) should have the same effect. "The use of a few prescribed words will now incorporate in a deed, according to the nature of the case, one or other of the several accustomed clauses which were formerly inserted at full length." [2] A year later the Settled Land Act, 1882, made a still more notable advance. Ever since the Restoration a considerable proportion of landed estates in England have been under settlements, created sometimes by testamentary disposition, more often by family compacts on the occasion of a son's marriage or coming of age, and renewed from generation to generation, the operation of which is to limit the present holder's interest to his own life. Powers of sale and management were conferred on trustees in all skilfully framed settlements, without which the life tenant and his expectant successors might have found themselves, in possible circumstances, gravely embarrassed. These provisions worked but cumbrously, and sometimes precariously.[3] The separation of enjoyment from authority was obviously bad from an economic point of view, and persons dealing with the trustees had to be satisfied that they were duly authorized and acting within their powers. By the Act of 1882 these drawbacks were removed, and the tenant for life is now not only a person receiving rents and profits, but an administrator of the estate with full power of disposal, so far as the outer world is concerned. He is liable, of course, to account for capital proceeds; in practice the other beneficiaries are as secure as ever they were, and the management of the estate is greatly simplified. Still the simplification, as we have already said, is a simplification of machinery. The successive limited interests and all the incidental minute provisions for various events are not done away with, but sheltered behind the "screen of trustees," as Maitland has called it.

Both the Conveyancing Act and the Settled Estates Act (with some few supplementary enactments) have now been in force for a full generation, and have worked quite smoothly. It is true that the judicial construction of the Settled Estates Act has led to one tiresome little piece of formalism that was not foreseen,

[2] Pollock, *The Land Laws* (3rd ed.), London, 1896, p. 167.

[3] I have elsewhere endeavoured to describe the scheme of a family settlement with as little technicality as possible: *op. cit.* p. 111 *sqq.*

as it was certainly not intended, by the authors of the Act. A few such accidents are to be expected when legislation undertakes the elaboration of highly technical details.

Tenant farmers occupying land under leases or agreements were not much favoured in the law of England before the last quarter of the nineteenth century. So far as legislation had touched them, it had increased the legal remedies and powers of landlords at their expense. Fashionable economic theories tended the same way. General doctrines were laid down on the assumption that all men of normal capacity were equally free and competent agents in fact. It is true that no general rule can be arrived at without working on averaged facts and neglecting individual differences to some extent: but the economists, or, at any rate, the legislators and Judges who applied their rules, forgot that the supposed normal or average man is not to be found in any living specimen. People who were dissatisfied with the contracts they had made were told without any attempt at discrimination that it was their business to secure themselves by adequate stipulations when they made the contract, and if they had failed to do so it was their own fault. Want of ability to bargain on equal terms, unless downright coercion or fraud were alleged, was not an admissible hypothesis in the orthodox economic school.[4] Small tenants, like artizans and labourers, could find very little comfort there. With the reaction of the later nineteenth century against that school relief came to the farmers and other smaller folk. Tenants were secured in the ownership of their buildings and fixtures, and entitled to claim compensation for permanent improvements, by a series of statutes, collectively known as the Agricultural Holdings Acts, of which the principal one was passed in 1883. These Acts were consolidated in 1908.

Acquisition of holdings for culture on a small scale and in spare time has been made possible, by direct agreement or through the ownership of local authorities, by another series of Acts, known as the Allotments and Small Holdings Acts, and also consolidated in 1908.[5] I abstain from entering on details which, unless given with minute and tedious particularity, would be useless, and might well be misleading.

Quite recently the Board (now Ministry) of Agriculture has been empowered to acquire land "for the purpose of providing experimental small holding colonies" (Small Holdings Colonies

[4] It was even attempted to apply these ideas to Ireland. A section of monumental stupidity in a certain Irish Act—of 1861, I think—solemnly enacted the reign of pure contract between landlord and tenant. But this is beyond my scope.

[5] There are minor statutory amendments of later date.

Acts, 1916 and 1918; in the full title of the principal Act "the State" is for the first time, I think, recognized in the official vocabulary of Parliament). I am unable to say whether anything considerable has yet been done in execution of these powers. In any case they are hardly within the domain of private law. As an economic symptom, however, this step is important.

Registration of title to land has been the subject of experimental legislation for more than half a century, and of professional discussion for a much longer time. The Australian Torrens system has been extensively adopted in English-speaking jurisdictions overseas,[6] but in England we are still feeling our way. "In 1862, in Lord Westbury's chancellorship, an office of land registry was established, and the offer of a State guaranty and great simplicity in future dealings was held out to owners who could satisfactorily prove their title. But the requirements of the initial proof were for most owners more formidable than the inconveniences of the existing system. . . . In 1875 Lord Westbury's plan, being supposed to have failed through over-ambition, was supplanted by a more tentative and elastic one,"[7] still purely optional. This also did not prove, on the whole, tempting to landowners. A further and more determined attempt was made by Lord Halsbury in 1897; but the Act is disliked by most practising lawyers, and does not seem to have elicited much public support. In London, where it is compulsory by way of experiment, it has failed to give satisfaction. Ten years ago a Royal Commission, including very learned persons, took much expert and other evidence, and made a number of recommendations,[8] of which great part are embodied in Lord Birkenhead's comprehensive Bill now pending.[9] One source of dissatisfaction is that registration does not effectually supersede the old forms of private conveyancing, and in many quite ordinary transactions it is still not prudent for a registered owner to dispense with them, so that, instead of being relieved from trouble and expense, he is only saddled with a new formality. The technical reasons for this cannot be explained here; the future of the Land Registry is now bound up with

[6] An elaborate digest of the provisions in force in the British dominions has been published by Mr. J. E. Hogg, who has long been familiar with the Torrens system in Australia: *Registration of Title to Land Throughout the Empire, etc.*, Toronto and London, 1920. The peculiar system of Scotland stands apart, and is therefore barely touched upon.

[7] Pollock, *The Land Laws*, 1896, p. 173.

[8] This report was discussed in the Law Quarterly Review, xxvii. 173, 417; xxviii. 6, 26. An account of the existing rules is given in the last chapter of *Williams on Real Property* (22nd ed.), London, 1914.

[9] Now Law of Property Act, 1922 (12 & 13 Geo. 5, c. 16).

that of the present Chancellor's great project of reform, which, as we said above, it is not possible to foretell with any confidence at the time of writing.

The law of private obligations created, or, in the language of the Indian Contract Act of 1872, resembling those created, by contract was in the main well settled in the first half of the nineteenth century, but there have been recent notable developments in some branches. Contracts by correspondence gave much trouble before they were brought under practical rules in harmony with our general doctrine as to the formation of agreements. Instruments under seal, which are still governed, subject to necessary equitable temperaments, by the mediaeval conception that a man's admission of liability verified by his seal is conclusive, may be left aside as exceptional; otherwise a contract is formed by the exchange of a promise either for an act requested by the promisor or for a reciprocal promise. Until such exchange is made there can be no promise, but only a revocable offer; and there must be a decisive moment when the offer becomes a binding promise by acceptance either in words —not a bare acceptance, but a counter-promise—or in act. Between parties who are both present this is quite simple in principle. The problem was to regulate the conclusion of agreements between parties at a distance without admitting some anomalous rule of expediency. Within our own time it has been solved, after much discussion and some difference of high judicial opinions, on the following lines. The proposal of a contract is deemed to continue until it reaches the party to whom it is addressed. It may be accepted in any manner authorized by the proposer, and usual means of communication are presumed to be authorized. Acceptance without notice of revocation is complete as soon as it is committed to an authorized course of dispatch to the proposer. In the commonest case, therefore, the decisive point of time is fixed by the posting of a letter or sending off of a telegram accepting the offer. At that point the contract is concluded, and delay or miscarriage of the acceptance is at the proposer's risk.[1] As a logical result, any subsequent attempt at revocation would be ineffectual, even if it reached the proposer before the acceptance (as if an acceptance by letter were recalled by telegraph). This question is still undecided. There is some temptation to make an exceptional rule for such a case; but I think reflection will show that it ought to be resisted, for it is

[1] The latest and most complete authoritative declaration of the law is in *Henthorn* v. *Fraser* [1892] 2 Ch. 27.

in the acceptor's power to protect himself either by express reservation or by delaying his answer till the latest available date.[2]

There is no separate commercial jurisdiction in England.[3] Nevertheless the growth of mercantile, and especially maritime, affairs since the eighteenth century has produced a considerable distinct body of doctrine; and problems arising in this region, although at first sight they appear merely specialist, are capable of reacting on the exposition of more general principles. Commercial litigation arising out of the late War has compelled attention to certain features in the law of contract hitherto treated as rather anomalous, and given us a more comprehensive point of view.[4]

We knew before the War that in some cases (exceptional cases, it need hardly be said) the obligation of a contract might be discharged by performance becoming impossible without the fault of either party. Destruction of the subject-matter, such as a building, by accident, was the leading example.

We also knew that the parties to a contract may make the obligation of one or both of them depend on a condition; that such a condition need not be expressed in the contract; and that sometimes it may be inferred from the nature of the transaction without having been expressed at all.

Some of us already doubted whether the cases of subsequent impossibility were not best accounted for on the ground of the contract being, in its inception and according to the common sense of the matter, conditional; and our doubts were increased when the rubric of impossibility was stretched to cover events quite compatible with all the terms of the contract being performed, as in the case of an agreement to hire a room in London on the intended day of King Edward VII's coronation, nothing being said about the coronation, but the hirer's obvious purpose being to see the procession, which in fact did not take place that day by reason of the King's sudden illness.

Further, there was a known doctrine of "frustration of the adventure" applicable to the interpretation of charterparties and policies of marine insurance, and obviously more or less akin

[2] Several Codes, including the Indian Contract Act, have laid down empirical solutions, not always clear or exhaustive. I do not think any of them preferable to that which our Courts have worked out on the old lines of the common law.

[3] For about twenty-five years we have had a "Commercial Court," but this is only a convenient name for an administrative arrangement of judicial duties made by the Judges of the High Court.

[4] See, for fuller particulars, Arnold D. McNair, *Legal Effects of War*, Cambridge, 1920, cc. 4, 5.

to the rules which had been independently laid down in cases of performance—or, as in the "coronation cases," such performance as would fulfil the real intention—becoming impossible.

War conditions notoriously destroyed normal expectations and frustrated the intentions of parties in many ways. Judicial treatment of the resulting problems, especially when considered in the freedom of the House of Lords, where only the decisions of that House itself are above criticism, has brought all the lines of authority now mentioned under one common principle. Possibility in the literal sense is not a universal or an adequate test; the ultimate question is always whether the contract, whatever it was, remained capable of execution according to the true governing intention of the parties.

This, indeed, makes it the duty of the Court, in many cases, to form the best judgment it can of what the parties, as reasonable men, would have thought and said if their attention had been called to the possibility of such an event as was in fact unforeseen and contrary to all expectation, but also did in fact happen. In other words, what risks would they have taken if their eyes had been open? A century ago not many English Judges would have thought such a question admissible; now the Court of Appeal and the House of Lords are ready to face it. If this be legal fiction, it is fiction of the beneficent kind.

To make this doctrine applicable there must be what is called commercial impossibility preventing performance according to the intention, not merely an increase of burden or loss of profit such as results from the dearness or scarcity of goods to be supplied under a contract.

Commercial troubles due to the War were also mitigated by special and temporary measures of legislation. It would not be useful or practicable to enumerate these.

Monopoly and all transactions tending to create monopolies have been odious to our law for many centuries. Whatever may be said about the details of modern American legislation against the industrial trusts which command, or seek to command, the markets for steel, oil, or other commodities, there is nothing novel in their spirit. There is no reason to doubt that the law fairly reflected the public opinion of the Middle Ages. Further, it was thought that every man skilled in a craft was bound in conscience, even if not legally compellable, to exercise his craft for the common good, and therefore should not be held bound by any agreement to the contrary. But it became obvious, about the end of the sixteenth century at latest, that this could not be an absolute and universal rule in a trading community. A

trader quitting his business, and desirous of realizing its value, would hardly find a buyer if he might not offer him some security against immediate competition on the part of the seller. Like reasons apply to the cases of a partner retiring from the firm and of an employee setting up in trade on his own account. Some modification of the broad objection to restrictive agreements had to be admitted, and for a long time attempts were made to lay down fixed rules as to the admissible limits. In our own days it was perceived that rules which might do very well for the trade of a self-contained community would not do for the conditions of world-wide commerce, and the House of Lords has achieved the feat of setting the doctrine of our Courts free from artificial fetters of definition without any assistance from the Legislature and without expressly censuring any of the older authorities hitherto received. The decisive case was as late as 1894[5]; the latest survey of the subject in a court of final appeal was made by Lord Parker of Waddington (a man of legal genius too early lost to us), delivering the opinion of the Judicial Committee of the Privy Council not many years ago.[6]

It had been supposed that a contract "in restraint of trade" was in no case allowable, unless the restriction were confined within certain bounds of time and place, or, at any rate, of place. We used to read in all the text-books that a restraint unlimited in space was bad. But it is now held that the earlier definitions were only special applications of the general principle to local circumstances, and the Court has to decide in each case, without being bound to any fixed rule, whether, on the whole, the restriction to which a contracting party has pledged himself goes beyond what is reasonably required in the interest of the persons concerned and of the public. If it is, in the opinion of the Court—for this is not within a jury's province—"so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public," the agreement is justified and enforceable.[7] The seller of a business carried on all over the world may reasonably bind himself not to compete with the buyer in any region where that business is current.

In the Middle Ages it would have been impossible to enforce contracts extending to things to be done or abstained from in foreign countries for a reason quite different from that of public policy, to which, indeed, as then conceived, it would have been

[5] *Nordenfelt's Case* [1894] A. C. 535. Learned opinions had previously differed, nor were the reasons given in that case itself uniform.

[6] *Attorney-General of Australia* v. *Adelaide Steamship Co.* [1913] A. C. 781.

[7] Lord Macnaghten in *Nordenfelt's Case.* In that case the complaint was of an agreement made in Belgium with a Belgian company.

indifferent whether foreigners in their own countries did or did not suffer the evils of monopoly or any kindred inconveniences. For so long as the jury was thought of as a body of neighbours certifying the facts of their own knowledge, jurymen were deemed incapable of knowing anything that happened out of England, and therefore of informing the Court what the facts were in such a case.

An observer in search of generalizations might suppose that the relaxation of the older views about agreements in restraint of trade was a triumph of capitalist individualism, and that the Court would take a much more favourable view of such agreements in general after the decision of the House of Lords in *Nordenfelt's Case*. But in fact the enlarged discretion now in the hands of the Judges has been exercised quite otherwise. In the cases of this kind reported since 1894 the disputed restriction has been disallowed more than twice out of three times. The explanation may be that the framers of such clauses have become bolder in their experiments of late years, or those who purport to bind themselves less willing to submit in practice. A few of the decisions deal with combinations of manufacturers or producers against the public; these are ancient enemies of the common law, and get no countenance from *Nordenfelt's Case*.

About sixty years ago the authors of the draft Civil Code of New York (rejected in that State, but adopted in some American jurisdictions) thought that allowance of contracts in restraint of trade had gone too far, and wilfully tried to narrow the exceptions (section 833). The Indian Contract Act of 1872, which has been influenced for the worse in many places by the New York draft (in my opinion, the worst Code ever framed by persons who ought to have been competent), unfortunately copied their language (section 27). The departure from English law, even as it stood then, seems to have escaped the notice of the Indian Legislative Department. The divergence is now greater; but although the general intention of the Indian Act was to reproduce English law, this section stands unamended.

The learning of agreements in restraint of trade overlaps to a certain extent the complicated problems (further perplexed by the operation of the extraordinary Trade Disputes Act of 1906, conferring a large immunity on the parties to such disputes) which arise out of trade combinations, strikes, and boycotting. A few words may be said here of these matters, regardless of strictly logical order. Critical explanation must be sought elsewhere: the following results are now certain enough for practical purposes.

No civil action lies for conspiracy, unless there is an agreement to pursue some unlawful object or to use unlawful means.

As no one is bound, apart from special contract, to deal with any particular person, there is nothing unlawful in the withdrawal of custom from a trader, still less of voluntary contributions, either by one person or by several in concert. But threats to drive away a man's customers are unlawful, and the wilful procurement of breach of contract (subject to statutory immunity under the Trade Disputes Act, and possibly to other exceptions in cases of privileged advice honestly given) is an actionable wrong. The motive, contrary to what was once supposed, is not material. Simple warning of consequences, which the person giving such warning has no power to bring about or prevent, must be distinguished from threats of coercion. This is a question of fact; it may be a difficult and delicate one.[8]

We have mentioned the violent interference of the Trade Disputes Act. At the general election of 1905-1906 the trade union leaders seized the opportunity of exacting pledges from candidates eager for support, who gave them improvidently. Thus they forced the hand of the new Ministry, and took their revenge for provocation which, it must be admitted, was grave and long continued. But for this our Courts might have worked out a just and rational doctrine some years ago. As it is, trade unions are still under anomalous disabilities, and enjoy no less anomalous immunities—a clumsy and unsatisfactory solution which one hopes may not last for ever. Consequently our jurisprudence, by no fault of the present generation of Judges, is far less intelligible and instructive for purposes of comparison than it ought to be.

The somewhat kindred topic of workmen's compensation for accidents is almost, though not altogether, removed from private law by the Act of 1906 (recasting and superseding that of 1897, and largely supplanting the imperfect remedies given by an Act of 1880, which, however, is not repealed and not wholly obsolete). Employers of labour are now made insurers against accidents without regard to the diligence or negligence of themselves or their subordinates. The Acts have produced a huge mass of litigation under the special procedure they provide, and of reported decisions which discuss facts with extreme minuteness and throw no light whatever on any principle of law. Employees

[8] See notes of recent decisions in Law Quart. Rev. xxxv. 116, 283; xxxvi. 103. One or two still later ones are not yet reported. [And see Addendum to *Pollock on Torts*, 12th ed., 1923.]

are not forbidden to take the risk of bringing an action under the Employers' Liability Act, 1880 (generally less advantageous), or even under the common law. In the last case they are still confronted with the doctrine of the servant taking all unspecified risks, including negligence on the part of their companions or superior employees, which was unhappily invented and stereotyped by a series of decisions made in the period of extreme individualism.

In the department of purely private civil wrongs, if I may call it so, there have been many developments interesting to English lawyers, but oftener than not of a local and technical kind.[9] Perhaps the most remarkable of them from a wider juridical point of view is the decision of the Court of Appeal and the House of Lords, now ten years ago, that a man who had innocently made use of a name he supposed to be fictitious may find himself liable to an action for defamation at the suit of a plaintiff of whose existence he never heard.[1]

The measure of diligence as to the safe condition of structures intended for human habitation and use (not buildings alone, for ships, and even land carriages, are included) which persons coming thereon, or in the case of buildings passing thereby, on their lawful occasions, are entitled to expect of the occupiers and controllers, apart from claims founded on tenancy or any other special contract, has been elaborated at various times from principles laid down a few years before 1870. One cannot say that the results are yet perfectly harmonious; the House of Lords has never had the question before it.[2]

Finally, we may say a word of the progress made in the codification of mercantile law. We have had a Bills of Exchange Act since 1882, a Partnership Act since 1890, a Sale of Goods Act since 1893, and a Marine Insurance Act since 1906. Besides these, the Merchant Shipping Act of 1854 was revised and consolidated with later statutes in 1894. All these Acts dealt with law which was already well settled and understood in substance, and did not attempt improvement beyond abolishing a certain number of minor doubts and anomalies. The example has been largely followed in other English-speaking lands. It is beyond my province to speak of the remarkable success achieved by the American Bar Association in procuring uniform legislation in many distinct jurisdictions.

FREDERICK POLLOCK.

[9] French readers will be quite safe in consulting for further information down to 1910: Adrien Gérard, *Les "Torts" ou délits civils en droit anglais* (Laval: L. Barnéoud & Cie.).

[1] See Law Quart. Rev. xxv. 341; xxvi. 103.

[2] Law Quart. Rev. xxxii. 255; xxxiv. 160. [See now *Fairman* v. *Perpetual Investment Building Society* [1923] A. C. 74.]

THE LAW AND THE COURTS OF PALESTINE.

IN his Introduction to the *Handbook of Palestine*, which appeared last year, the High Commissioner, the Right Hon. Sir Herbert Samuel, wrote: "If I were called upon to express in a single word the distinguishing characteristic of Palestine, I should say 'diversity.'" What is true of the physical characteristics, the climate, the religions, the peoples, and the civilizations of that little country is equally true of its laws and its judicial systems.

For a population of some 750,000 persons, of whom nearly 600,000 are Moslem Arabs, 70,000 Christian Arabs, and about 85,000 Jews, there is a truly remarkable diversity of legal systems and jurisdictions. Indeed, in Palestine to-day, the whole history of law is exemplified. You have in the district of Beersheba in the south, Tribal Courts composed of Arab sheikhs, applying tribal custom as a binding law for the Bedouin. You have in each little town a Moslem Religious Court, applying the rule of the Sharia, that is, the Moslem jurisprudence, to all the personal affairs, questions of marriage, guardianship, succession, of the Moslems. You have, further, in the larger towns, a Rabbinical Court, applying to similar matters for the Jews the Mosaic law as it has been developed through the records of Rabbinical learning; and the Courts of the Christian Patriarchates, applying for Christians a law which, in the case of the Orthodox Church, is based upon the Byzantine Codices, in the case of the Roman Catholic Church is based upon the canon law of the Middle Ages, and in the case of the Armenian and other smaller Churches is based upon their peculiar ecclesiastical traditions.

Then, side by side with these peculiar jurisdictions and privileges, you have the Civil Courts of the Government, dealing with all matters other than personal status for the members of all communities, and applying a law which is primarily founded upon Ottoman legislation, but which has been modified considerably during the last five years by enactments passed by the British Administration. From one additional complication of the legal system which existed prior to the British Occupation

Palestine has indeed been largely relieved—the jurisdiction of the European Consuls, who, under the capitulatory system, were authorized to deal, according to their national law, with criminal charges against their subjects and *protégés*, and with civil suits between two members of their national community, or between a member of their community and another foreigner. These Consular Courts have been almost entirely abolished since the British Occupation; I say almost entirely, because the Government of the United States has claimed to exercise its former rights with regard to its own subjects in Palestine through the Consular Courts as they existed prior to the British Occupation. It has agreed that those rights will disappear when the mandate for Palestine actually comes into operation; but although the mandate has been approved by the Council of the League of Nations, it is not yet actually in force,[1] and America, not having been a party to the conferring of the mandate upon Great Britain in 1920, cannot be required to recognize, as the other Allied Powers have done, the *de facto* operation of the mandate.

Thus within this little country, smaller in area than Wales and with a population less than that of Liverpool, you have in operation examples of the various systems of law and systems of Courts which have marked the development of legal institutions in Europe for a thousand years—the elders of the people sitting at the gates and interpreting custom; the religious heads of the community administering their religious law; the professional Judges of the State administering to all persons the law of the State; and, lastly, the representative of a foreign country administering his foreign law to the subjects of his own country.

The British Administration, on occupying Palestine, *more suo* maintained in force the law and, in its main lines, the judicial system which it found there. Considerable changes indeed have been introduced into the administration of the law and the procedure by which the Courts are governed, but the Codes themselves and the systems of jurisdiction have been modified only in minor detail.

The Order in Council issued in 1920, which is the Magna Charta, as it were, of Palestine, lays down: "The jurisdiction of the Civil Courts shall be exercised in conformity with the Ottoman Law in force in Palestine on November 1st, 1914, and such later Ottoman Laws as have been or may be declared to

[1] Since this article was written in the summer of 1923 the Mandate has been brought into operation by a resolution of the Council of the League passed last September; but the agreement to be made between His Majesty's Government and the United States with regard to the position of American citizens is still under negotiation.

be in force, and such Orders in Council, Ordinances and Regulations as are in force in Palestine at the date of the commencement of this Order or may hereafter be applied or enacted." It is true that the clause continues: "Subject thereto, and so far as the same shall not extend or apply, the jurisdiction shall be exercised in conformity with the substance of the Common Law and the doctrines of equity in force in England, so far as the circumstances of Palestine and its inhabitants and the limits of His Majesty's jurisdiction permit, and subject to such qualification as local circumstances render necessary."

In other words, the Civil Courts are to administer primarily the Ottoman law and the ordinances issued by the Palestine Government; and where those texts do not supply a solution for any question which arises, then, and then only, are they to turn to English law for guidance. A very interesting development of jurisprudence is promised; for the Ottoman law is in its basic principles altogether different from European law, and it has now to be moulded to meet the needs of a far more complex civilization than that for which it was originally designed, under the guidance of British Judges, who may, when necessary, turn to English law. It is true that the process has already been operating for forty years in Cyprus, but the circumstances of that secluded island have not conduced to any striking legal evolution.

The Turkish Civil Code, known as the Mejelle, is, as Lord Curzon recently pointed out at the Lausanne Conference, the product of theological jurists, and based in the last resort on the Moslem religious law. Before the middle of the nineteenth century the Religious Courts were the only regular tribunals in the Ottoman Empire, and they applied the Moslem law as laid down in the Koran and developed in the tradition of the jurists of the Golden Age of Arab jurisprudence. Influenced by the codifying enthusiasm that had already seized upon many countries of Europe, the Turkish Sultan Mahmoud, in the middle of the nineteenth century, initiated a movement for the reform of the law of his Empire. Codes of penal law, criminal and civil procedure, commercial and maritime law, were borrowed with uncritical admiration from France, and the Napoleonic system was rendered into the cumbersome Turkish language and given as a law to Ottomans, Arabs, and Kurds. In questions of civil right, however, the Sultan thought fit to preserve the traditional Moslem rules; though, influenced here, as in other spheres of law, by the belief in Codes, he caused the "Sharia" to be embodied in an orderly system.

The Mejelle does not comprise any rules of personal and family law, because those matters are still dealt with in Religious Courts, according to the religious books and traditions. It is, however, a Code which covers questions of contract, and, though very inadequately, of tort, of movable and immovable property, and of evidence. In its arrangement it owes something to the influence of modern European models; in its substance it is innocent of such influences, and its general outlook is mediaeval. This character is most remarkably illustrated in the book concerning evidence, which concludes the Code and contains exact rules as to the preference of proof, elaborated with the subtle casuistry of the Schoolmen and designed to remove from the Judge the need of exercising any judicial discretion.

Thus to take two or three Articles at random:

"The proof of a sale is preferred to the proof of a gift, of a pledge, and of a hire; but the proof of a hire is preferred to the proof of a pledge; *e.g.* if a man bring an action against another, saying, 'I sold you such a thing; now pay me its price,' but the defendant reply, 'You delivered to me this thing as a gift,' then the proof of the sale is preferred."

"The proof of health is preferred to the proof of mortal sickness; *e.g.* if a man die after having given a certain thing to one of his heirs, and the other heirs maintain that the gift took place at the time when the donor was in a state of mortal sickness, but the donee maintain that it took place when the donor was well, the witnesses of the donee are preferred."

"If the litigant has the preference for proving his action, but is unable to produce the required evidence, the other party may prove his statement; and if at the same time with its proof judgment is given, the proof which the first litigant may claim to produce cannot afterwards be received."

It is a fundamental principle of Moslem jurisprudence that only affirmative evidence is admitted, and the Judge is bound by the consistent assertion of at least two witnesses. In order, however, that his evidence may be admitted, the witness must bear a good character, and the Code prescribes various methods of certifying credibility. There are two principal methods—either open enquiry from persons of the class to which the witness belongs; *e.g.* if the witness is a scholar, the director of the school is examined; if a merchant, then merchants of good reputation are asked; or a secret enquiry by means of a document which is appropriately called *mestoure*. The Judge applying the latter procedure indicates in a letter the names of the parties, the subject-matter of the action, the name, profession, and

residences of the witnesses. He sends this letter in a sealed packet to persons whom he selects to report upon the credibility of the witnesses, and these persons sign their report and return it in a sealed packet to the Judge. Their function bears a curious resemblance to those of the compurgators of an accused person in the early English procedure.

The Mejelle prescribes also the qualifications and duties of the Judge, and contains a touchingly simple title concerning the manners of the Judge, which lays it down: "The Judge, when he is in Court, must avoid any act and any movement which may lessen the dignity of the Court, as, for instance, he may not do business or make jokes. The Judge may not receive gifts from any of the litigants. The Judge must not accept any invitation to eat with any of the litigants."

One example may be given to illustrate the difference in the substantive law of the Ottoman Civil Code from that of European law. It is taken from the section concerning the rights and obligations of neighbouring properties, and is designed to secure the privacy of the women's apartments, which is one of the great institutions of Oriental life.

The Article provides: "The overlooking of places where women sit or go, such as the kitchen or courtyard of a house, constitutes actionable damage. Thus, if a window which a person has opened in his house, or the window of the house which he has lately built, looks on the part of the house contiguous to it, in which women sit, the removal of this damage is ordered, and the owner of the first house is bound to do away with the damage by building a wall or making a screen of planks in such manner that the women cannot be seen. In the same way, if, through the chinks of a neighbouring fence, part of a house occupied by women is seen, the owner of the fence is ordered to close these chinks."

In place of our law which requires the protection of ancient lights, the Ottoman Civil Code prescribes the protection of ancient privacies.

Many of the rules about immovable property in the Ottoman law are likewise peculiar. The principles contained in the Mejelle are amplified in a special land law which was issued subsequently, and which has, as its general purpose, to secure the cultivation of all agricultural land, and to preserve the rights of the rulers of the country to resume possession of such land if the tenant of the estate does not put it to advantage. Thus land which is not cultivated or developed for a period of three years escheats to the Government and is sold by auction, unless the

previous tenant pays the unimproved site value. Land is divided into three principal categories—mulk, held in full property in the same way as movable property; miri land, held on a tenancy from the State, something in the nature of English copyhold; and wakf land, dedicated to God for some charitable purpose (though the charity may begin, and all but end, in the family of the dedicator), which is inalienable, imprescriptible, and in fact taken out of disposal. The religious law and the Moslem Religious Courts that did with the last category have devised many ingenious ways of getting round the basic prohibitions.

The British Administration has not made any fundamental changes in the land law; but it has taken steps to render effective registration of title, which in the Ottoman time was nominally compulsory, but in practice regularly evaded. It has initiated a cadastral survey to be followed by the settlement of the land, which will give to the titles, that now have a baffling vagueness of boundary and an almost invariable misstatement of area, a certain and exact definition; and lastly, it has authorized juristic persons to own land in their own names, instead of being driven to the device of holding it through a nominee, who had the legal title and was free to dishonour his equitable trust, if he happened to be a dishonest person, without the control of any Court of Chancery.

The Ottoman penal law, as has been noted above, is based on the Napoleonic Code, which is over a hundred years old; and the Ottoman law-giver, though occasionally induced by some grave scandal or passing need to adopt some of the French amendments of that Code, has in many cases left his criminal law in its antique condition. It is proposed to revise the Code in the light of modern European criminal law. In the meantime certain minor amendments have been introduced, such as the abolition of minimum penalties, the substitution of detention in a reformatory and probation for young offenders in place of imprisonment, and the penalizing by a number of ordinances of minor offences which had escaped the attention of the Ottoman legislator.

The larger revision, which was proposed some three years ago, at once aroused opposition on the ground that it was an unlawful interference with the established habits of the people by a temporary ruler who had not obtained definite sovereignty. The only habits which were likely to be changed by the alteration of the Code were those of criminals, for whom no great regard appeared to be necessary; but it was thought better to leave the amendment until a regular legislative body is constituted.

The commercial law, like the penal code, is founded on an

antiquated model. Since the beginning of the nineteenth century the law of bills has undergone great change; the whole law regarding trading by limited liability companies has come into being; the notions of bankruptcy have been radically modified; and a number of international conventions have affected the law in all European countries with regard to rights in industrial property. Of all these changes the Turkish legislator took very inadequate regard. Such amendment as he made was sketchy, except that he did, shortly before the War, adopt, as the law of the country, the international convention regarding cheques made at the Hague Conference in 1912, and thereby gave that convention its first lease of practical utility. The British Administration has dealt more drastically with the amplification of the commercial than of any other branch of the law. The English Companies Acts, with some necessary simplification and some modification by way of stricter Government control, have been introduced as the law regarding trading with limited liability. An ordinance based on Indian legislation has been introduced to provide for the establishment, privileges, and control of co-operative societies. Another ordinance introduces the principles of the English law of trade marks, another those principles with regard to copyright, while an ordinance of similar character concerning patents is awaiting consideration.

The Ottoman Codes of Procedure are modelled closely upon the French Codes. So far as civil procedure is concerned, only minor changes have hitherto been introduced, and the Courts have maintained the somewhat dilatory system by which "opposition" may be made to a judgment given in default; and the case is then reheard by the Court which tried it, with a further right of appeal from the judgment given on the rehearing. It is contemplated to introduce a new law of evidence based on the Indian evidence law, which will take the place of the mediaeval rules in the Mejelle with regard to preference of proof; but at present the Courts have to use their ingenuity so to apply the existing laws of evidence as not to conduce to miscarriages of justice.

The French and Ottoman criminal procedure contains a complicated and elaborate system by which all more serious offences are investigated by an examining magistrate or a Public Prosecutor, and in the case of 'crimes,' that is, offences punishable by penal servitude or death, the committal to trial is made by a Chamber of the Assize Court. The British Administration has simplified the system in practice without as yet introducing a radical reform in the law; but an ordinance concerning criminal

procedure, which embodies the main principles of the English law, has been drafted and is awaiting consideration by the legislative body. Already, however, criminal investigation is conducted by the police; and the Public Prosecutor, who is a Government official with powers of ordering arrest but no other magisterial powers, acts as the legal adviser of the police and prosecutes before the Courts; while committal for trial for all more serious offences is carried out by a single magistrate.

The system of Courts has also been simplified and somewhat anglicised. The Turks, who were parsimonious in the number of officials of most Departments, were extravagant in the number of Judges. Palestine comprised three sanjaks or counties—Jerusalem, Nablus and Acre—in each of which there was a Court of Appeal with five members. In each kaza or sub-division of the sanjak—and there were in all thirteen kazas—there was a Court of First Instance with three members. In addition, there were magistrates with summary jurisdiction in the principal towns, and a Public Prosecutor in each kaza and an examining Judge in most. Finally, there was a recourse in cassation to the Supreme Court in Constantinople.

Many, indeed most, of the Judges had no legal training and were rather in the nature of assessors appointed to assist the President of the Court, who had some appearance anyhow of legal qualification. They were commonly known as "coffee members," because they received a nominal salary of two Turkish pounds per month which paid for the cups of coffee that were necessary to their functions. The British Administration has greatly reduced the number of Judges, and greatly increased their pay, and, it is hoped, their qualifications.

The minor criminal and civil work is now done by single magistrates, who are in every case Palestinians. There are twenty magistrates in all, one in each town of any size, and two each in Jerusalem, Jaffa and Haifa. Above the Magistrates' Courts are the District Courts, composed of a British President and two Palestinian members, who deal in first instance with the more serious offences and civil cases where the value of the subject-matter is above £E 100; and hear appeals from the Magistrates' Courts in both civil and criminal cases. There are four District Courts, with their centres at Jerusalem, Jaffa, Haifa and Nablus, and they go on assize for criminal work into the sub-districts.

Parallel with the District Courts are two Land Courts, one for Northern and one for Southern Palestine, which try suits concerning the ownership of land. The other civil work and criminal work of the District Court is so heavy that it has been found

necessary to have special tribunals for dealing with the complicated disputes about land titles which arise out of the chaotic condition of Turkish registration.

Above the District Courts and Land Courts is the Supreme Court, which sits in two forms. As a Court of Appeal it hears appeals from the District Courts and Land Courts; as a High Court of Justice it will administer those remedies dear to the English system, *habeas corpus* and *mandamus* and the like, which in the Turkish regime were matters of administrative action, but, under our rule of law, are to be granted judicially. The Supreme Court is composed of a British Chief Justice and another British Judge and four Palestinian members, two of whom are Moslems, one a Christian, and one a Jew. The Court of Appeal sits normally in two Chambers, each of three members. The High Court not yet in being is to be composed of two Judges.

The Constitution provides for a Court of Criminal Assize, which will try offences punishable with death and any other very serious offences that may be specified. It will consist of the Chief Justice or the other British Judge of the Supreme Court sitting with the regular District Court; but the legislation providing for the constitution of the Court is still awaiting consideration.

Finally, the Palestine Order in Council provides for an appeal in civil matters where the amount or value in dispute exceeds £E 500 from the Supreme Court to His Majesty in Council. The Order in Council prescribing the conditions of the appeal has not yet been issued, because the ordinance providing for the constitution of the Supreme Court is also awaiting consideration.

Although the capitulations are abolished, the Palestine Constitution makes provision for the trial of foreign subjects in a way which should assure that they should not be prejudiced by being subject to the ordinary law and the ordinary Courts of the country. A foreigner accused of any but the most petty offences may claim to be tried by a British magistrate, and, if accused of an offence which is not triable by a magistrate, may claim that the preliminary investigation shall be undertaken by a British magistrate. If he is committed for trial before the District Court or the Court of Criminal Assize, the Court shall consist of a British Judge sitting alone or shall contain a majority of British Judges. In a civil case tried by the District, whether in first instance or on appeal, he may claim that at least one member of the Court shall be a British Judge, and in civil and criminal cases heard by the Court of Appeal, that the Court shall contain a majority of British Judges.

In matters of personal status affecting foreigners the District

Court has jurisdiction, but is to apply the personal law of the parties concerned, which is the law of the nationality, unless that law imports the law of the domicile. The District Court in such matters is constituted by the British President sitting alone: but where the personal status of a foreigner other than a British subject is concerned, the President may invite the Consul or a representative of the Consulate of the foreigner to sit as an assessor for the purpose of advising upon the personal law concerned. It is prescribed that the Court shall have no jurisdiction to pronounce a decree for dissolution of marriage until an ordinance is passed conferring such jurisdiction; and while foreigners may consent to questions of their personal status being tried by the Courts of the Religious Communities having jurisdiction in those matters affecting Palestinian citizens, the Religious Courts, other than the Moslem Tribunal in the case of a foreign Moslem, have no power to grant a decree of dissolution of marriage to a foreign subject. Palestine is not to rival Dakota for those foreigners who seek easy divorce.

"Foreigner" includes any person who is a national or subject of a European or American State or of Japan, and corporations and religious or charitable bodies constituted under the law of the foreign State, or wholly or mainly composed of the subjects of such a State. It does not, however, include the native inhabitants of a territory subject to the protection of, or a mandate granted to, a European State, or subjects of the Ottoman Empire. All persons claiming to be treated as foreigners forfeit their right unless they make the claim on the first appearance or in the first written pleading delivered to the Court.

It will be seen that the rights of a foreign subject in Palestine are far better secured before the Courts than they will be in Turkey under the new conditions. The aim has been to maintain unity of jurisdiction with a reasonable diversity of composition of the Courts.

One last and original feature of the Civil Courts in Palestine may be noted, and that is the languages of pleading. The Constitution provides that English, Arabic and Hebrew shall all be official languages and may be used in the Courts both for written and oral pleading, subject to certain restrictions which prescribe Arabic as the sole language of pleading in the lower Courts of districts where the population is almost entirely Arab. In the higher Courts, however, both English and Hebrew are frequently used; and though the employment of two or more languages in forensic debate is apt to protract the proceedings and to place a strain upon the judicial patience, the system on the whole works

well and is a necessary concession to the national feeling of the different communities.

Turning now to the jurisdiction of the Religious Courts, the matters of personal status which come under the scope of these tribunals include suits regarding marriage or divorce, alimony, maintenance, guardianship, legitimation and adoption of minors, the appointment of curators for persons legally incompetent, wills and intestate successions, and the administration of the property of absent persons. The Moslem Religious Courts, which were the original Courts of the Ottoman Empire and were a fundamental part of the State system prior to the Occupation, retain their exclusive jurisdiction in all those matters of personal status of Moslems, and also in cases of the constitution or administration of a wakf, that is, a trust which may be either a charitable endowment or family settlement constituted for the benefit of Moslems. Under the former regime they had larger powers, because by an anomalous, though characteristic, inequality of the Turkish system they exercised jurisdiction in regard to successions, guardianship and appointment of curators of all non-Moslems as well as of Moslems. The Turks granted jurisdiction to the Christian and Jewish communities, but limited it to matters arising out of the marriage relationship and to confirmation of wills. Where differences occurred between members of those communities in any matter of succession or guardianship, they had to repair to the Moslem Religious Court and have their dispute settled by the Moslem Religious Law;—a necessity, which induced the peaceful settlement of these family affairs. Similarly, the Ottoman system recognized the jurisdiction of the non-Moslem Religious Tribunals with regard to the administration of charitable endowments of their communities, but no endowment could be *constituted* except before a Moslem Religious Court and according to the Sharia Law, and any question as to the validity of the endowment or its constitution had to be decided according to that law and by that Court.

The Constitution has remedied these anomalies, but it has not given the tribunals of the Christian and Jewish communities equal jurisdiction with the Moslem Courts, because it was deemed inexpedient to compel the members of those communities to be subject to their religious law in matters in which they were not hitherto subject to it. The non-Moslem Courts receive exclusive jurisdiction in matters of marriage and divorce, alimony and confirmation of wills of Palestinian members of their community, and over any case concerning the constitution or administration of a religious endowment constituted before the Court. In

matters of personal status, however, other than those above mentioned, they have jurisdiction only where the parties to the action consent; otherwise it is the Civil Court which exercises that general jurisdiction in matters of personal status that previously was vested in the Moslem Religious Court. The Civil Court is to apply special ordinances in these matters, which will establish a residuary civil law for succession, guardianship, etc. The example of India where the religious law of the different Indian communities has been interpreted by English Judges is not to be followed. The religious law will be applied by the Religious Courts alone, and no appeal is possible from the religious tribunal to the Civil Court.

Each community establishes its own system of appeal. The Moslems, whose Religious Courts are still State Courts paid by the Government though appointed by an autonomous Moslem body, the Supreme Sharia Council, have a regular Appellate Tribunal of three Judges. The Christian and the Jewish communities have a procedure by which the judgment of the Religious Tribunal in First Instance can be carried to the supreme religious authority in the country.

A civil law of succession has already been enacted, and a civil law of guardianship is under consideration. The law of succession has not introduced any striking innovation, but adopts for all purposes the Ottoman Law of Inheritance to immovable property held of the State (Miri): which law, from the point of view of liberality, compares favourably with the English Statute of Distributions. With regard to wills, the ordinance adopts the main principles of the English law with some simplification. Power is given to a Religious Court to apply the civil law of succession if it thinks fit, the object of this faculty being that the Religious Court shall retain the jurisdiction where the parties will not agree to the application of the religious law, *e.g.*, because it gives inadequate recognition of women's rights, but agree to the distribution of the estate by a religious authority.

It may be thought that the system of dealing with questions of family law that now pertains in Palestine is extraordinarily and unnecessarily complex, and that it would have been simpler to transfer the entire jurisdiction over persons of non-Moslem communities to the Civil Courts. But that step would have been vehemently resented by the heads and by a great number of the members of the Christian and Jewish communities, who cherish the maintenance of their religious law and of their religious jurisdiction in these matters. A simple solution would not suit complicated circumstances.

The Constitution has made some provision for conflicts of jurisdiction which are bound to arise between the different series of Courts. Where an action of personal status involves persons of different religious communities, application may be made by any party to the Chief Justice, who (with the assistance, if he thinks fit, of assessors) decides which Court shall have jurisdiction. Where a question arises as to whether a case is one of personal status within the exclusive jurisdiction of a Religious Court or is a matter in which the Civil Courts have jurisdiction, a special tribunal, which is to be composed of the Chief Justice and the other British Judge of the Supreme Court, together with a representative of the Religious Court concerned, is to decide the matter.

As an example of the intricate problems of jurisdiction which can arise in the hearth of religions and the centre of religious rivalries, a recent *vexata quaestio* may serve. A man of the Roman Catholic community married a woman of the Orthodox (Greek) community in an Orthodox Church. The husband and wife had differences; and the husband, having apparently repented of his desertion from his own Church for the celebration of marriage —possibly because of the unfortunate issue—agreed with the wife to submit the matter to the Latin Patriarchate. The Ecclesiastical Tribunal decided against him and granted an order for alimony to the wife. The husband, disappointed again, failed to obey the order; and the wife, who had in the meantime been received into the Latin Church, applied to the Civil Court, which executes the judgments of the Ecclesiastical Tribunals when necessary. The Civil Court granted the order for execution. The husband appealed to the Court of Appeal, which, however, rejected the application on the ground that it had no jurisdiction. The husband then instituted proceedings in the Criminal Court against his wife for adultery, which is a penal offence under the Ottoman Code. The ecclesiastical authority protested vehemently against the reception of the criminal case, on the ground that the matter had already been dealt with in the proceedings for judicial separation. The woman, on the advice of the Patriarch, refused to appear in the proceedings, and judgment was given against her in default. She was sentenced to payment of a fine, and the Civil Court refused to compel payment of the alimony by the husband until the fine was satisfied.

This *démarche* created great perturbation, but in the end the ecclesiastical authorities were persuaded that the woman should appear in the criminal proceedings and make "opposition" to the judgment by default. At the rehearing the Court found that

the case of adultery was not proved, and the criminal judgment against the woman was therefore cancelled, and the execution of the Patriarchal judgment proceeded again. Then, however, the husband tried a further device and became converted to the Lutheran Church and made application to divorce his wife. This last matter is still pending before the Civil Court.

The rules of private international law which apply in European countries with regard to jurisdiction in matters of marriage and divorce require to be modified to suit the circumstances of a country where the personal law depends not upon nationality or domicile, but upon membership of a religious community. The general principles, however, which are contained in the Hague Conventions of Private International Law would appear to offer guidance to the harassed Courts of Palestine, where they have to decide upon the effect of conversions and recantations on the marriage relations of the parties.

It may be found possible in time to enact certain rules as to conflict which would be based upon the fundamental principle that in the case of a contract such as marriage, involving mutual rights of two parties, a unilateral change of personal law should not affect the rights in regard to that contract of the other party. When, therefore, two persons have married under a regime which prohibits divorce, the husband or wife alone could not become entitled to a decree of dissolution of the marriage by being received into a community which has a law permitting divorce. But in the sphere of private international law as well as in the development of the civil law, Palestine will for years to come offer an unexhausted field to the legislator and endless scope to the collector of legal problems, so that a new interpretation may well be given to the words of the Prophet: "From Zion shall go forth the law."

NORMAN BENTWICH.

THE JUDICIAL SETTLEMENT OF INDUSTRIAL DISPUTES.[1]

THE subject upon which I have the honour to address you is so wide that within the time at my disposal I can only hope to touch upon elementals. My task will be less onerous if I limit myself to the system of public control of industrial relations in South Australia. Each State of the Commonwealth has its own system. There is also a Commonwealth Court of Conciliation and Arbitration for the purpose of the settlement of industrial disputes which extend beyond the limits of a single State. This dual system of control by Courts of co-ordinate control has led to much conflict in the past. I can only say, speaking of time present, that practical necessities tend towards a co-ordination of the principles which underlie the decisions of Commonwealth and State Courts.

Limiting myself to South Australia, I crave your indulgence while I try to explain in brief the general machinery under our Industrial Code. That Code is the most elaborate and ambitious attempt of its kind, if not in the world, at least in Australia. It provides, in the first place, for a Board of Industry. The Board consists of representatives of employers and of employees, nominated by the Employers' Federation and the Trades Hall respectively, together with a President who is a Judge of the Industrial Court. The chief functions of the Board of Industry are to schedule the industries of the State, and to declare from time to time the living or standard wage. In the scheduling of industry the Board has been careful to limit its action to such industries as lend themselves to public control. The declaration of the living wage by the Board is a highly important function discharged after a full public enquiry and investigation. Employers and employees are usually represented by counsel. The enquiry may take several days or even weeks. Evidence and argument are taken down in full. Transcript is submitted to

[1] An address delivered to the Society of Public Teachers of Law on July 12, 1923.

both sides from day to day. At the conclusion of the public hearing, the Board sits *in camera*, and finally declares its conclusion. So far, conclusions have been unanimous. The unanimity has come as a surprise to parties and the public. How is it obtained? As I have been President of the Board on these occasions, and am not here to betray State secrets, I do not propose to answer the question. I will only say that the long and sometimes painful course to unanimity has not been by the easy process of "splitting differences."

I have said that the Board of Industry schedules industries. With respect to industries so scheduled, machinery is provided by the Code for the constitution of what are called Industrial Boards. These Boards are constituted of representatives of employers and employees of the particular industry scheduled, and of an independent Chairman nominated by the President of the Industrial Court. The functions of an Industrial Board are essentially legislative. Each Board makes a determination which fixes wage or piece rates and general conditions of employment for the industry for which the Board is constituted. If the Board is not unanimous, either side may appeal to the Industrial Court. The Court consists of the President and one or more deputy presidents. These may sit as Judges in first instance, or together as a full Court. In practice, they keep in touch with one another. If new and difficult questions of law, practice or principle arise, the full Industrial Court sits. After a question is settled, the matter is then referred back to the Judge in first instance to continue the hearing.

The jurisdiction of the Court is original with respect to industries not scheduled by the Board of Industry, and appellate with respect to industries which are scheduled. The Court has also a criminal jurisdiction—original in the case of a strike or lock-out and appellate from decisions of stipendiary magistrates in the case of breaches of awards or other offences against the Code. In all jurisdictions the decision of the Court is final and conclusive. I may add that this is so in fact as well as in law. I mean that employers and employees alike accept the Court's decisions.

From the point of view of adjectival law, in each jurisdiction the Court is dealing with a suit *inter partes*, originating in a submission by employers or employees, summons, notice of motion, or the lodging of an appeal against a determination of an Industrial Board.

From the point of view of substantive law, the function of the Court is to extend the reign of law to industrial relations. It is

easier to say what this does not mean than to say what it does mean. It does not mean the substitution of caprice for reason. It does not mean the reign of compromise, since this must lead to varying and conflicting results in different industries. In an industry where the employers can pass on wages to the consumers with comparative immunity, they might yield to terms which would cause dissatisfaction among wage earners in other industries. While the Court encourages settlement by agreement, an agreement is not made a consent award of the Court without careful scrutiny. What the Court has striven to do is to constitute a structure of doctrine which—to quote the words of my revered master, F. W. Maitland, used in another relation—if not a masterpiece of juristic elegance, is at least wind and weather tight.

I have endeavoured to outline in a very general way a system of the public control of industry as provided in the Industrial Code of South Australia. I now propose to discuss the following subjects very briefly by way of illustration:

1. The judicial character of the Industrial Court.
2. The living wage.
3. The relative functions of Industrial Boards and the Industrial Court.
4. Limitations of public control over industry.
5. The Industrial Court and the legal profession.

1. *The Judicial Character of the Industrial Court.*

This is evident from the constitution of the organ, the nature of the process followed, and the functions discharged. I dwell upon the subject mainly for purposes of illustration. I also have in mind the difficulty that some lawyers might feel in view of the fact that the Court usually acts prospectively rather than retrospectively. In the first place, the hearing before the Court is a *lis inter partes*. In the second place, the view that Judges only interpret and do not make law is a fiction even in the ordinary civil law. In the third place, the Industrial Court stands by precedent—not of course with cast-iron rigidity: general rules, legal conceptions and principles are reached through a long series of decisions; usage and opinion, changing social aspirations, and economic needs, react upon the earlier decisions, developing their content, and qualifying their operation.

As the body of law relative to industrial relations increases, the interpretive function becomes more and more important.

There are, of course, important distinctions which normally distinguish judge-made law and law made by an enacting body. A normal judicial organ (omitting rules of Court) makes law incidentally to the determination of a dispute or matter. It interprets rights which are assumed to be conferred by pre-existing law or the spirit of pre-existing law. It operates retrospectively as well as prospectively. Its primary function is to settle a dispute or matter—the law-making is a by-product. It is, of course, subject to legislative control. It may exercise, but does not usually profess, the power of reviewing its previous declarations of the law. Its laws have to be gathered, not from formal statements or principles, but from a decision, or more often a number of decisions, in which the legal principles or rules are embedded. On the other hand, a law-enacting or legislative body (*a*) avowedly imposes new law; (*b*) does so by way of legislative as distinct from judicial process; and (*c*) expresses a will for the purpose of binding other than parties to a dispute or matter.

So far as Courts of compulsory arbitration are concerned it can be said with truth that, quite apart from principles they may adopt when framing awards, and quite apart from the powers of enforcement that they have, those Courts necessarily interpret the industrial legislation which controls their action. They have also to interpret the rules of Court which they are empowered to make, and which, when made, have a statutory force. Incidentally to the foregoing, the industrial arbitration Courts have to interpret a great deal of common law which is of necessity read into the industrial legislation and the rules of Court. Further, Industrial Courts have to interpret and apply principles which have been affirmed in previous cases. The modern Parliament is often abused; but it would savour of contempt of Parliament to assume that it could have supposed that the industrial peace and stability of a community could be attained save by the gradual development of a code of rules governing industrial relations. The code is progressive; but so much is said by Jessel, M.R., and by other Judges, of the common law. The code of industrial law, like the civil code, broadens from precedent to precedent. Each new award expressly or implicitly contributes to it, and controls or limits the area of apparently unlimited discretion. I say "apparently unlimited" because I have in mind the fact that every award necessarily takes note of custom, just as common law Courts did. The Industrial Court gives a binding force to custom if the custom be reasonable—a requirement not unknown in the case of customary law in the civil Courts. In any case,

more and more, by the very nature of things, awards must tend to become merely an application of principles, previously affirmed, to circumstances of time, place, and occupation. The position of the industrialists gradually changes from one of pure contract to one of status. In the interpretation of the new status, circumstances both of public policy and of customary observance, of social and economic needs, blend with, or are taken up in, the course of the discharge of the judicial function. A legislature which avowedly creates a Court of record empowered to arbitrate compulsorily may not necessarily have read a familiar statement of Holmes, J., but the statement deserves quotation, since its substance may be assumed not to have been wholly beyond the ken of legislatorial knowledge. "The life of the law has not been logic: it has been experience. The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which Judges share with their fellow-men, have a good deal more to do than the syllogism in determining the rules by which men should be governed."

The fact that the Courts of Arbitration in the exercise of arbitral functions appear as creative of new law rather than interpretive of established law is an incident of an early stage of compulsory arbitration in industrial matters. When a new award is made, it creates no new independent right, but only gives form and substance to the right or status implicitly conferred by statute, and judicially expanded from time to time, by Industrial Courts. One is reminded of the difficulties with which the Supreme Court of the United States has been confronted in interpreting the Anti-trust Acts, and the emphasis laid on the Rule of Reason. Of course, when the Legislature enacts a policy, the details of that policy may be left to an administrative body. In such a case we have an illustration of an administrative power as ancillary to legislation. When, however, the powers are vested in a Court of record empowered to make binding rules of Court, designed to follow judicial process, and to give a judgment which is a binding, final, and conclusive determination between the disputants who litigate before it we have legislative authorization of the exercise of judicial power.

2. *The Living Wage.*

The concept of the living wage was worked out in a number of decisions of the Industrial Court before the Industrial Code was passed. The Board of Industry has adopted the principles

affirmed by the Industrial Court. I may quote the substance of a recent declaration of the living wage made with respect to women workers.

(1) While the need for public and private economy is equally evident and urgent, South Australia is not quite so hopelessly bankrupt in resources of material, or of mind, or of will, as to warrant the Board of Industry in declaring as a standard living wage for unskilled workers generally a sum inadequate to supply what may be regarded as the bare necessaries of life in a supposedly civilized society.

(2) There is no impropriety in the belief that a sane economy should be sought through increased efficiency on the part of either employees or of employer, or of both, in the complex mechanism of production, rather than through wages so low as to menace the health of the working population, to depress purchasing power in the local market, and to give a legal sanction to the creation or growth of a malnutritioned and discontented proletariat. The Board assumes that employers and employees, speaking generally, are not so devoid of intelligence as to fail to realize the importance of a more effective co-operation in the processes of production.

(3) The "normal and reasonable needs" of the wage-earner, as referred to in the statutory definition of "living wage," are not to be ascertained by reference to what may be deemed a possible scale of wages in industries passing through a period of abnormal depression due to world-wide influences.

(4) With respect to industries of the kind just referred to, the Board assumes that the State Industrial Court will adhere to its frequently reiterated policy of bringing parties together in order that they may discuss the desirability of carrying on for the time being, and, if so, the question of ways and means by agreement of the parties without judicial regulation.

(5) Although a previously declared living wage during some time that it has been in operation may have become ineffectual to maintain the standard of normal and reasonable needs, owing to a rapid increase in the cost of living due to world-wide causes, the duty of the Board, as indicated by the Industrial Code, is simply to declare a living wage for the future on such evidence as it has before it.

(6) For the purpose of such declaration, while actually current prices at a particular moment of time are relevant, average prices extending over at least a quarterly period are of more value, whether prices appear to be likely to ascend or descend in the near future.

(7) The question whether a prior estimate of a living wage should be reaffirmed or varied should not be answered without some reference to the date at which, and the general scope of the evidence upon which, the prior estimate was given.

(8) Increases or reductions in wages in other parts of the world, whilst relevant even in an investigation with respect to the living wage, must be viewed in relation to the industries in which, and the circumstances under which, such increases or reductions have been made.

(9) The duty of the Board is to interpret "normal and reasonable needs" by reference to the evidence before it, and to form its own conclusion, even though such conclusion may mean a lower wage than is enforced, either by other State industrial tribunals in Australia or by the Commonwealth Court of Conciliation and Arbitration.

(10) While the national production and income are relevant for the purposes of considering what wage may be considered a living wage, the duty of the Board in respect to women workers is to apply the standard of needs, as distinct from the standard of the relative value of the work of men and women employees respectively.

(11) In the interpretation of the needs of the unskilled woman worker, the sum implicit in the declaration of the living wage for adult males for the maintenance of the woman who works in the home as wife and mother, though not conclusive, is yet relevant for consideration.

3. *Relative Functions of Industrial Boards and Industrial Courts.*

Whilst on an appeal from an Industrial Board determination the burden of proof is on the appellants, more and more the Industrial Boards are influenced in arriving at a determination by principles or decisions affirmed by the Industrial Court. It was said, when the Court was first constituted, that there would always be an appeal. This has been completely disproved. An appeal from a determination of a board to the Court is unusual, because the employers and employees make it their business to keep in touch with the body of doctrine affirmed by the Industrial Court and recorded in the *Industrial Courts Law Reports.*

4. *Some Limitations of Public Control.*

The Code does not extend to agriculture. But apart from this limitation, the practice of the Court has been to recognize

that it should limit its control to minimal conditions for the particular industry under adjudication—it might almost be said to conditions which are in the common interest of the employers and employees throughout the industry. If a Court were to attempt to work out a complete code for the amelioration of social conditions, it would promote neither efficiency nor harmony. An award of the Court is in the nature of a basis upon which individual employers and their employees may build. Something far more extensive in the promotion of common interests may be possible within the scope of any particular business concern, whether by profit-sharing, co-partnership, or any other scheme of mutual aid.

5. *The Court and the Legal Profession.*

Some difficulty has been experienced in convincing employers and employees that the so-called practical man, however complete may be his knowledge of the working conditions in an industry, is not, as a rule, qualified to present in Court the case for one side or the other. The "practical man" is very necessary to instruct. He is very necessary as a witness. But he is usually ill-equipped to state a case before a Court which, though nominally free to disregard the strict rules of procedure and evidence as known in the civil Courts, exercises that freedom with great restraint, for the simple reason that the rules referred to represent the wisdom of generations as regards getting at truth. Union secretaries, with all their zeal and fluency, have on occasions been great offenders. Both sides, however, are now learning—if, indeed, they have not already learned—the advantage of representation by counsel. I may quote as an illustration a case in which I gave judgment just before leaving Australia. The plaintiffs were a union of bank officials registered under the Industrial Code. The defendants were the banks. I had the assistance of a bar of five, including two King's counsel. I think that, in the course of the hearing, both parties learned much of the facility with which counsel, adequately instructed, could become acquainted with the details of even such an esoteric business as banking. I should add that the Court has been in rather a fortunate position, since its Bar is specialized. When counsel first come before the Court, they are apt to take frivolous objections or to rely on *nisi prius* eloquence. Only in January last I had occasion to stop counsel in the conduct of his case. I said: "Are you seeking to impress your clients or the Court?" He at once answered: "Both, your Honour." I rejoined:

"You are not succeeding with the Court." I may add that several of his clients were in Court. Under the circumstances, the douche of cold water proved effective. But my remarks are not limited to the arena of the Court. I make them, sometimes very emphatically, in chambers or elsewhere. I recall one evening, during an interval at the bridge table, asking a wealthy employer why he had come into Court to conduct his own case (needless to say, the case was *res judicata*). I said: "You would not give me employment on your works as a one-horse driver, yet you come into Court in a matter involving hundreds of thousands of pounds as if you were entitled to do so as a trained advocate." He said: "Well, I know I made a fool of myself, but I shall know better next time." My rejoinder was: "Good. Shall we resume our bridge?" I believe this is what would be called by a certain section "taking up one's cross in season and out of season." But, to be quite serious, it is impossible for me to say how much I personally have owed to the assistance of counsel who, from experience of industrial matters, have the indispensable *savoir faire*.

JETHRO BROWN.

REPRISALS AS A MEASURE OF REDRESS SHORT OF WAR.

Sect. 1.—*Reprisals under Letters of Mark and Reprisal.*

"REPRISALS" is a mediaeval term which is first met with in the thirteenth century.[1] Lawyers, who wrote in Latin, knew it as *repraesaliae* or *repressaliae*, an almost exact rendering of the French *représailles* and the Italian *ripresaglie*. They tried hard to identify the usages it represented with practices they knew in the civil law. Especially did they try to identify it with the Roman *pigneratio*.[2] It was not till the early eighteenth century that the essential uniqueness of reprisals was categorically asserted by Bynkershoek in such forceful terms as "operam luduut qui rem apud Romanos incognitam Latino vocabulo conantur exprimere."

During the thirteenth century the best organized of the rudimentary States of the Europe of that day were trying to put down the primitive measures of alleged self-redress, which led to so much internal turbulence, in order to substitute for them a legal or at least a State-authorized process. One type of forcible self-redress it was attempted to suppress was reprisals. In the *Constitutiones Siculae*[3] is to be found the following command: "Ut nullus auctoritate propria de injuriis et excessibus factis vel faciendis in posterum se debeat vindicare nec praesalias seu Repraesalias facere, vel guerram in regno movere."

Reprisals here clearly mean forcible seizures of goods, and in exceptional cases of persons, from those who have made similar seizures unprovoked.

[1] The word "reprisals" is always found in close connexion with the Low Latin *marca* throughout the mediaeval period. Mediaeval kings speak in the [illegible] of granting letters of mark and reprisals. *Marca* and *marcare*, however, occur already in the twelfth century. See Ducange under "Marca."

[2] The Council of Paris said in 1314: "Pignerationes quas vulgaris elocutio repraesalias nominat." Ayala says: "Pignerationes hae, quas repraesalias vocant." *De Jure et Officiis Bellicis*, lib. 1, c. iv.

[3] Lib. 1, tit. 5.

But the practice was not confined within the borders of the State. It was a mode of redress for injuries inflicted by the citizen of one State upon the citizen of another, and was employed in time of peace. The mediaeval theory, very firmly held, of the joint responsibility of all citizens for their prince and for one another would singularly affect this type of reprisals, making all the fellow-citizens of one who had done injustice liable to reprisals. The hardship that might be inflicted on innocent persons did not fail to arouse some protest. A Church Council in Paris is found making a pronouncement in 1314 which contains the following: "Pignerationes quas vulgaris elocutio Repraesalias nominat in quibus alius pro alio praegravatur, tamquam graves legibus et aequitati naturali contrariae, civili suit constitutione prohibitae. . . ." [4]

Practical men, however, felt that the only way to achieve a substantial measure of justice between men who had not a common prince to supervise the right conduct of their relations was to interest the whole community in which they lived in the suppression of their wrongdoing. The practice of reprisals certainly did this, and could still be defended even in later ages on this ground. Grotius and Bynkershoek, while allowing the imperfect equity of reprisals as sometimes punishing innocent persons for the wrongdoing of guilty, alike maintain that the practice is necessary in the last resort. Moreover, even if injustice is done to an individual in the first place, the practice of reprisals leaves a high degree of probability that it will be corrected. As Grotius says,[5] "et spes erat facilius membra ejusdem societatis a se mutuo jus consequi posse, et indemnitati suae consulere, quam externo, quorum multis in locis exigua habetur ratio."

Reprisals, however, even to work rough justice, would need to be steadily controlled. Lawyers would be impressed by the appalling abuses possible in a system which allowed individuals without hindrance to take reprisals from all the citizens of a State one member of which they alleged had done them a wrong. Princes would see that reprisals undertaken privately by the subjects of one against the subjects of another would be likely to lead from outrage to outrage into a state of war. This was in fact the case when the Cinque Ports sailors undertook reprisals against the French Channel sailors in 1292.[6] Princes felt it to

[4] In Martenius, tome 7, Ampliss Collect., quoted by Ducange.
[5] Lib. iii. c. 2, *De Jure Belli et Pacis.*
[6] *Moore's Digest*, vol. 7, p. 131, quoting *Ward's Law of Nations.*

be necessary that their subjects should ask them for authorization.[7] Only in this way could they examine the justice of the demand and know the extent of their political commitments if they resolved to approve of its enforcement. Subjects, on the other hand, would find it advisable to have authority for forcible seizure in order to protect themselves from the charge, and possibly the penalty, of piracy.

Already in 1295 Edward I was writing[8]: "Bernardus nobis supplicavit ut nos sibi licentiam marcandi homines et subditos de regno Portugalliae et bona eorum per terram et mare quousque de sibi ablatis habuisset restitutionem." It was not till 1353, however, that Edward III speaks as though reprisals could only be authorized by him. The Statute of the Staple of 1353 reads in c. 17 as follows: "Item qe nul marchaunt estraunge soit emplede ou empeche pur autri trespas ou pur autri dette dount il n'est pas dettour plegge ou meinpernour: purveu totes voies que si noz ligez gentez marchauntz ou autres soient endamages per ascuns seignours destraunges terrez ou leur subgitz et les dites seignours duement requis faillent de droit a nouz dites gentz, nous eions la lei de mark et de represailles come ad este use devaunt cez heures saunz fraude ou mal engin."[9]

Finally, Henry V went so far as to appoint special officers to punish what he considered piracy, but what the average sailor of the day would probably have regarded as legitimate reprisals.[1] In 2 Hen. V, st. 1, c. 6, is to be read: "Qe en chescun port de meere soit fait et assigne un loial homme appele conservatour de trieues et saufconduitz de roi . . . que le dit conservatour eit . . . le poair de punir toutz ceux que sount ou serront enditz . . . sibien a suyte de Roi quome a suyte de partie dascune chose affaire encountre les trieues et saufconduitz de roi sur le haut meere."[2]

Some injustice[3] appears to have been done by the King's wholesale suppression of violence against foreigners, for very soon the legislation was altered and provision made for reprisals, even in time of peace. Reprisals were only to take place after *lettres de requête* had been sent out under the Privy Seal and disregarded. The aggrieved party was then to obtain letters of

[7] Philip the Fair's decree (1313), quoted in De Martens' *Essai concernant les Armateurs*, is typical: "Ut de requisiti in reddenda justitia defectu constet illi qui marcham indicere voluerit per literas regias vel alia publica instrumenta antequam ad dictam marcham procedat."

[8] Rymer, *Foedera*, vol. 2, p. 691.

[9] Statutes of the Realm, printed by command 1816, vol. 1, p. 339.

[1] See opening paragraph of stat. Hen. V, 4, c. 7, *op.* cit. vol. ii. p. 198.

[2] Statutes of Realm in op. cit. vol. ii. p. 178 ff.

[3] See opening paragraph of stat. Hen. V, 4, c. 7.

mark under the Great Seal, which would authorize him to make reprisals until he had recovered property equal in value to that which had been violently taken from him.[4] Princes not only restrained the reprisals of their subjects by requiring them to obtain special authorization, but also limited their own power of issuing such authorizations by treaty provisions. Many treaties[5] of peace from the fifteenth century onwards contain the condition that no reprisals shall be authorized until the prince of the subject despoiled shall have applied officially for redress to the prince of the alleged despoiler. For example, the Treaty of 1550 between the monarchs of Spain and Scotland contains the following provision: "nec debebunt litterae repressaliarum debitis admonitionibus et requisitionibus non praecedentibus decerni: admonitiones fiant per expressum Nuncium quem Princeps Partis quae de jure sibi denegato contendet mittet ad alterum Principem. . . . Post ejus Legati vel Nuncii reditum, si constat clare et aperte jus denegari aut indebite retardari aut plus justo differri reppressaliae concedi poterunt."[6] Treaties containing this type of provision persist very long in European history. De Martens, in his *Essai concernant les Armateurs* can quote several in the eighteenth century which allow reprisals only in the case of *déni de justice*.[7] A favourite question of theory especially concerned this term *denegata justitia* or *déni de justice*. Did it merely include those cases which the Courts had refused to consider, or might it cover the far wider class of instances where it seemed to aggrieved parties that the plainest notions of justice had been neglected? All the lawyers[8] urge great caution before reprisals are undertaken in any instance

[4] Stat. Hen. V, 4, c. 7: "Et a la greindre consolation de ses ditz foialx lieges au fyn qu'ils pourront pluis prestement et sanz longes delaies avoir remede en ces cas voet mesme nostre seigneur le Roi que cellui ou ceux qui se sentira ou sentiront grevez encountre le teneur et fourme de tielles trieues dedans le roialme d'Engleterre ou sur le meer ou es parties pardela compleindra ou compleindront au gardien du prive seal qi pur le temps serra qui tiel compleint oiee et entendue entferra pur la partie compleignante lettres de request soutz le prive seal en due fourme. Et si apres tiel request faite la partie requise ne ferra dedeins temps convenable due restitution ou satisfaction a la partie grevee adonques la chanceller d'Engleterre fera faire a tiel partie grevee si le voet demander lettres de marques desoutz le grande seal en due fourme."

[5] *E.g.* Treaty between Spain and Scotland, 1550, quoted in the text; treaty between Spain and France, 1489.

[6] Dumont, *Traités*, tome 4, partie 2, p. 12.

[7] France and United Provinces, 1739, Art. 33; France and Denmark, 1742, Art. 44.

[8] *E.g.* Grotius, lib. iii. c. 2, *De Jure Belli et Pacis*: "Jus denegatur . . . verum etiam si in re minime dubia (nam in dubia re praesumptio est pro his qui ad judicia publice electi sunt) plane contra jus judicatum sit." Bynkershoek, c. 24, "De Repressaliis": "Ne quis autem temere de justitia denegata conqueratur variis gentium pactis prospectum est," quoting Hispans. Dutch Treaty, 1648, and French-Dutch Treaty, 1662.

falling within the second class. There is a presumption that a Court has done justice if it has considered a case, and only the strongest proof ought to be sufficient to defeat it.

The grant of reprisals being nearly always made by the prince, the legislation of some States sought to make certain that the application for the grant would be heard in the proper atmosphere and examined with the suitable precautions. In England, as has been seen already, the grant would only be made after the plaint had been examined both by the Keeper of the Privy Seal and the Chancellor. In the Italian cities, to judge from John of Legnano,[9] the process seems to have been even more judicial. Where statutes laid down an order, that order was to be followed. Where they did not, a statement of claim was to be delivered, the party cited, and proceedings taken as the laws ordained. There were allowed to appear to oppose the declaration of reprisals, not only the delegates of the people against whom they were to be directed, but any member of that people, even without instructions; and, finally, any citizen of the State meditating reprisals, since he might be injured by the retaliation provoked by an unjust grant. Methods of proof of the alleged injustice and pleas for the defence were laid down. In France those petitions for reprisals which had gone before the Parlement had been examined judicially. When in 1485 the Crown by decree assumed the monopoly of grants of reprisal, it undertook to grant them only after "great consideration and complete knowledge." The Ordonnance de la Marine of 1681 definitely established a procedure. The Admiralty was to examine and assess the claim, half the amount of the claim was to be deposited as security, and the prizes made were to be judged in the same manner as war prizes.

Sect. 2.—*Obsolescence of Reprisals under Letters of Mark and Reprisal. Reprisals Undertaken by the State.*

At the end of the seventeenth century the old type of reprisal was already obsolescent. The decay was due to a variety of factors. The sea was better kept, and piracy almost negligible in European waters. Justice was better administered everywhere, and foreigners not markedly discriminated against. These results were largely due to the increasing part played in all spheres of national life by the central power, *l'état* proper. Such a state of things was bound to reinforce the movement for

[9] His work is entitled *De Bello, de Represaliis et de Duello.* See especially cc. cliii-clviii. Holland has an excellent edition issued by the Carnegie Endowment.

the definite abolition of reprisals, especially in a trading community of the type of Holland, whose merchants always possessed large stocks of goods in foreign ports and at sea, particularly exposed to seizures. Bynkershoek,[1] examining a succession of treaties [2] made by Holland with foreign Powers, comments on the progressive attempt to oust reprisals altogether from the sphere of international relations. His own opinion, however, was that while a restriction of the use of reprisals might be advisable their total abolition was impossible. The attempted abolition of reprisals provided for in such a treaty as that between the Emperor of Morocco and the States General of 1710 was useless. Reprisals must always remain the ultimate sanction for honest dealing between two persons or bodies of persons who were not subject to the same prince. "Sed cui bono ejusmodi conventio," he says, "quid enim si non administretur? utique tunc alter princeps ad Repressalias recurret et aiet, earum usum rebus ita exigentibus, necessarium esse coepisse."

Bynkershoek was right. Even with the growing power of the State individuals might still injure foreigners, and their Governments might show themselves unable or unwilling to punish the offenders and force them to make redress. Moreover, it was quite possible that a Government itself might take steps, with regard to foreigners, which their State would regard as a manifest injustice. While, therefore, it might always be necessary in the last resort to proceed to measures of force, the methods of its exercise were likely to change. States were becoming fully conscious of their rôle as the representatives of their subjects' interests abroad. Any injuries inflicted upon their subjects would increasingly be regarded as direct injuries to the State. Accordingly States were now far less likely to confine their efforts to obtain redress to a mere authorization to take reprisals allowed to the aggrieved. They would proceed to action themselves, and their subjects, accustomed to the greater ability and readiness of their Governments to act in their interests abroad, would ask for nothing better.

Two typical cases might be quoted in proof. During Cromwell's Protectorate an English Quaker's ship had been seized on the coast of France. He could get no remedy, and appealed to Cromwell. Cromwell gave him letters to the Chief Minister of France, Cardinal Mazarin, and asked him to come again if

[1] *Quaestiones Juris Publici*, c. 24, "De Repressaliis."
[2] Especially treaties between England and States General, 1654, Art. 16 (though Art. 24 mentions reprisals), and between Morocco and the States General, 1710, Art. 9.

he could get no satisfaction within three days. The Quaker could get no redress from the Minister within the time stipulated for the remedy by Cromwell. He returned and reported the facts. Cromwell dispatched two ships of war, with orders to bring in French ships and goods, which were to be sold until the extent of the Quaker's loss had been covered. The command was executed and the Quaker indemnified.[3]

During the Austrian Succession War (1740-1748), at a period when Prussia was neutral, Prussian merchants complained bitterly to Frederick II of the treatment they had received at the hands of the British Navy and the British Prize Courts. Frederick's diplomatic efforts on behalf of his subjects, continued for many years, did not meet with success. He appointed a committee presided over by Cocceji, a famous lawyer, to report as to whether the British seizures and condemnations had been justified, and, if not, what amount of compensation was due. This commission reported that the Admiralty and Courts of Justice in England had acted in violation of the law of nations, and even of a particular declaration concerning contraband made to the Prussian Minister in London by the Secretary of State. It would be just to indemnify the merchants who had suffered. They had made an examination of the claims, and had reduced them from 239,840 crowns to 156,846 crowns, but added 33,283 crowns as interest. The King was justified in using the money which he had bound himself to pay over to British subjects to indemnify his merchants for losses undergone as a result of the unjust conduct of the Navy and Courts of the British King. Frederick acted on the report of the committee, but the difference was settled in 1756 by a compromise.[4]

Despite the advent of the newer type of reprisal undertaken by the State itself, the older type under letters of mark and reprisal was not yet quite extinct. The last instances of letters of reprisal granted to private persons occur at the end of the eighteenth century. France made a grant of letters of reprisal to two of her subjects (shipowners), who had had ships seized by the British in 1778[5] before a declaration of war. Formal war intervened, and prevented action from being taken on the grant of reprisals pure and simple. In 1793 there was a grant of reprisals to certain Marseillais against Genoa.

The significance of the advent of a new type of reprisal destined

[3] Villemain, *Histoire de Cromwell*, vol. ii. p. 236.

[4] All the documents are given in full in De Martens' *Causes Célèbres du Droit des Gens*.

[5] De Martens, *Essai conc. les Armateurs*, quoting the Code des Prises.

quickly to oust the old was not immediately remarked upon by the publicists. Vattel, for instance, discoursed eloquently on the subject of reprisals, but did not draw attention to what was of cardinal importance. In different paragraphs [6] he mentioned State-authorized reprisals under letters of mark executed by private citizens and reprisals undertaken directly by the State, but he did not remark that the one was a dying practice while the other was growing in importance. G. F. de Martens, who was probably the greatest publicist in Europe at the end of the eighteenth century and beyond, had a clearer view of what was happening. "L'état préfère user lui-même de représailles en faveur de ses sujets," he says in his discussion of the subject,[7] while in his *Causes Célèbres du Droit des Gens* he goes into the full history of the Prussian reprisal already referred to. Klüber [7] begins his discussion on modes of redress short of war with the phrase: "Un état se fait droit à lui-même. . . ." He seems already to consider a wrong done to private individuals exclusively from the public point of view as a wrong done to their State.

Sect. 3.—*Modern Reprisals. Cases. A Definition. An Examination of their Utility.*

Inter-State reprisals have lost none of their importance since the late eighteenth century. They have been continuously employed for the redress of alleged grievances down to the present day. Two very modern instances may perhaps be fitly given here.[8]

In July, 1922, the German Government, owing to the rapid depreciation of the German exchange, applied for relief from some of the obligations it had undertaken under the Treaty of Versailles and subsidiary agreements. Among other things it requested the Allied Governments to grant a reduction of the monthly payments to the Allied clearing offices from £2,000,000 to £500,000. France was one of the Powers principally interested; but the French Government, mistrustful of German allegations of inability to pay, returned an emphatic negative to the request for a reduction of the clearing payments, and

[6] Paragraphs 346, 347, *Droit des Gens*.

[7] In his text-book on International Law.

[8] The policy adopted by France against Germany of the seizure of "productive pledges" in the Rhineland and the Ruhr must in its total aspect be regarded as a case of reprisal, though the French use of the term "sanction" and their claim to be acting under the Treaty of Versailles have veiled that fact. The matter cannot profitably be discussed here, owing to its intimate connexion with current international politics.

threatened reprisals if Germany did not give guarantees by August 5th that it would carry out its obligations under this head. These reprisals, consisting in the expulsion of 500 Germans from Alsace and Lorraine, the confiscation of the income and property of German companies in Alsace, and the non-recognition of German clearing claims, were actually commenced by the French Government, but countermanded when the business classes of the districts affected pointed out the effect on industry. The difference was successfully settled by subsequent negotiations.[9]

In July, 1923, some Frenchmen, alleged by the German police to be smuggling, were arrested near the border between territory occupied by the French and territory left unoccupied. They were detained at Barmen, but subsequently released. As a reprisal Barmen was occupied by the French forces for several hours, many arrests were made, and finally the whole occupied area shut off from the unoccupied area for ten days.[1]

It is necessary to go back for fifteen years to find an instance of as serious a reprisal as the last. In 1908 Holland had long had to complain of the treatment of Dutch ships by the Venezuelan authorities. When in this year the Dutch representative, M. de Reuss, was dismissed by the President and virtual dictator, de Castro, the Government of Holland resolved to take steps for the redress of its grievances. Dutch warships were sent into Venezuelan waters, and captured the entire Venezuelan Navy. De Castro had meanwhile fallen, and when his successor had completed negotiations to Holland's satisfaction the ships were restored to Venezuela.[2] This reprisal, however, may be said to have been taken with perhaps less precipitation than the French measure just quoted, and after a longer exploration of the possibilities of negotiation. It is certainly more typical than the French.

The examination of cases which has been undertaken should facilitate a definition of reprisals. When a State by patient diplomacy has failed to secure redress for a legal wrong inflicted upon it by another State, and with praiseworthy restraint desires to refrain from war, it is permitted to take against the delinquent State exceptional measures called reprisals, inflicting a not disproportionate injury and designed to compel consent to a just and satisfactory settlement. A warning, however, must be given

[9] Annual Register, 1922; also *The Times* from July 13th onwards to the middle of August.

[1] *Daily Chronicle*, July 17th, 1923, message from Cologne correspondent.

[2] Annual Register, 1908, under Holland and Venezuela.

that in many cases what the one State alleges to be a justifiable reprisal the other State will call an illegal act of aggression. Measures of reprisal, moreover, are to be distinguished from those of retortion, which are justified not by the illegality of another State's action, but by the harsh and oppressive bearing of its legislative enactments or administrative ordinances.

Prima facie it would seem that the existence of the right to undertake reprisals is an unqualified gain to international society. The extreme step of a declaration of war, with its possibly fateful complications, has not necessarily to be taken in order to bring material pressure to bear to secure the redress of a wrong which may be small in itself. The history of the nineteenth century, however, has revealed as possible such abuses of the method as to make several theorists doubtful of its utility.[3]

The great point which can be made is that in modern times the effective use of reprisals is confined to the Greater Powers in their relations with the smaller. This was not the case in the eighteenth century. Then reprisals were in fact practised against the Greatest Powers without necessarily implying war. Frederick II of Prussia, for example, practised reprisals against both Russia and England. England undertook reprisals against Spain, then a first-class Power. Since the middle of the nineteenth century, however, formal reprisals against a Great Power are universally felt to be impossible.[4] Reprisal, then, is only practised against small or weak Powers by others which fear little harm from the utmost step they can take. So confident, indeed, are they of the superiority of the force they can bring to bear that they take it for granted that the State against which they have proceeded will quickly bow to the logic of facts, and, not making a difficulty of its wounded dignity, will hurry on to concessions in order to secure relief from the measures of coercion.

It is obvious that measures like these may be abused. The Pacifico reprisal[5] was not honourable to the British name. The

[3] *E.g.* Calvo and Despagnet.

[4] In 1834 President Jackson had recommended reprisals against France on account of the reluctance of the French Chambers to vote an appropriation for the settlement of American claims. The French Government replied by withdrawing its Ambassador. Serious results might have followed but for the pacific inclinations of the French Government and the tactful mediation of the British Government: *Moore's Digest*, vol. 7, pp. 123-126.

[5] During an Athens riot in 1847 the house of Don Pacifico, a Gibraltar Jew and a British subject, was plundered. Instead of going to a Greek Court for redress in the first instance, he appealed to the British Government, which, after long negotiations, ordered a powerful squadron into Greek waters, with instructions to seize Greek vessels leaving Greek ports. These were to be held until justice had been done Pacifico. The Greek Government was compelled to accept the British terms, though it held that Pacifico had much over-estimated his losses: State Papers, 1850, pp. 332-932.

reprisals practised by France against China in 1884 [6] were a cover for what appears to have been a carefully-considered plan to secure the control of a Chinese province. Accordingly Calvo and Despagnet are perhaps not altogether wrong in looking upon reprisals as a method which does not always tend to the triumph of justice. Calvo says, referring particularly to the Pacifico reprisal and a British reprisal against Brazil in 1862: "Nous nous bornerons à citer ces exemples qui ont eu le plus éclatant retentissement et qui ont d'ailleurs excité une réprobation unanime." Despagnet says: "Au point de vue du droit des gens une grande puissance abusant de sa force envers un pays incapable de résistance se donne tous les avantages de la guerre sans assumer les responsabilités que celle-ci entraîne soit à l'égard du pays attaqué, soit à l'égard des Etats neutres." Despagnet was thinking mainly of instances of pacific blockade.

In some cases, indeed, it would seem that a declaration of war would be an actual advantage to the weaker Power. In nearly all countries a declaration of war can only be made with the approval of the legislative chambers. This is not necessarily true of reprisals, which could be undertaken by an unscrupulous Government unchecked, hoping to face its Legislature with a successful *fait accompli*. Again, the very publicity which always attends an outbreak of war serves to arouse world opinion to an examination of the justice of the conduct of the belligerents. The will, therefore, as well as the opportunities for intervention, is created. This is not true to nearly the same degree in the case of reprisals.

Sect. 4.—*Reprisals and the League of Nations.*

The signing of the Hague Convention regulating the opening of hostilities (1907) had already caused enquiry as to how the opening of reprisals was to be distinguished from the opening of hostilities.[7] Reprisals of the more serious type, such as those undertaken by Great Britain against Greece on the occasion of the Pacifico dispute, or by France against Germany in 1923, are differentiated in the first place from measures of war by the hope of the executing Government that its actions will not be taken by the other as having produced the legal state known as war. But the fact of war or no war does not depend on the hope of the Government undertaking reprisals, but on the intent of either

[6] See Annual Register, 1884, under "China."
[7] Westlake, *Collected Papers*, pp. 590-606.

party to the dispute. It seems hardly doubtful that legally a Power can accept any positive measure of aggression, such as the seizure of ships, subjects, or territory, whether called a measure of reprisal or not, as tantamount to an opening of war.

The bearing of these remarks becomes obvious when we turn to consider the Covenant of the League of Nations. According to its provisions, no member may declare war against another, except in very special circumstances fully set out in Articles 12, 13, and 15 of the Covenant. No mention, however, is made in any Articles of reprisals.[8] Does this mean that a Power can proceed to exercise reprisals with the old liberty? What, then, if the Power against which these steps have been taken chooses to regard them as marking the opening of hostilities? All the provisions carefully made to block the avenues to war would have been defeated, and each belligerent would be able, with some show of reason, to fix the blame for the outbreak on his opponent. It must be taken for granted, therefore, that war can only be waged under the conditions foreseen in the Covenant, and that acts of reprisal cannot be treated as acts of hostility, entitling the State against which they have been directed immediately to claim the full rights of war.

But are acts of reprisal themselves permitted, and if permitted, under what conditions? The wording of the Articles is important in this respect and should be examined with some care. Article 11 says that any war or threat of war is a matter of concern to the whole League, which has the right to take any action that may be deemed wise and effective under the circumstances to safeguard the peace of the world. In addition it is declared to be the friendly right of members of the League to draw the attention of the Assembly or of the Council to any circumstances affecting international intercourse which threaten to disturb international peace or the good understanding between nations upon which peace depends. Quite obviously under Article 11 members have not bound themselves to abstain even from serious measures of reprisal, though they are given the alternative of drawing the attention of the League to their grievances. A serious measure of reprisal, however, would either itself fall into the category of "threats of war" or would lead to such threats. It would, therefore, immediately come under the cognizance of the League, which possesses an uncircumscribed choice of action for meeting the danger.

[8] See Pollock's *League of Nations* (2nd ed.).

Article 12 is perhaps more directly our concern. The relevant portion reads:—

"If a dispute should arise between them (the members) likely to lead to a rupture, they will submit the matter either to arbitration or judicial settlement or inquiry by the Council."

Is a dispute, where one party has threatened the other with reprisals, a dispute likely to lead to a rupture? A plausible case can be made for excluding altogether from the scope of the Article disputes which have only reached the stage of a threat of reprisals for some alleged wrong. The mere fact that only reprisals are threatened, and not more serious steps, might be said to show that there was no likelihood of danger for the time. Moreover even the execution (and not merely the threat) of reprisals need not always have a very grave significance. Measures of reprisal are sometimes undertaken for small but very irritating breaches of international law, and in such cases there is not the least need to fear extreme developments. Just on occasions of this kind States would not like to submit their actions to long and futile examination. It might be argued that a sharp reminder by positive action would end the difficulty and secure redress quickly. The necessity of submitting to the delays of the processes mentioned in the Article, with all the petty chicaneries for which they give so convenient an opportunity, would encourage unwarranted action by unscrupulous Powers, confident that no direct measures would be taken against them for some time.

There is a good deal of force in these arguments. There seems no good ground in the Covenant for necessarily submitting to the processes of Article 12 such comparatively minor reprisals as those exercised, for instance, by Frederick the Great against England when the dispute neither before nor after the reprisals seemed likely to develop into war. It would be advisable, however, to provide that the Power undertaking this type of reprisal should report its grievance to the Council and the action which it has taken to secure redress. This could well be done under the latter section of Article 11. A State which has made reprisals with a good conscience need not fear investigation, while the Power against which they have been directed could also report and demand an inquiry.

The case is different, however, when such major reprisals as "pacific blockades" or wholesale expulsions are in question. A dispute during which such steps are threatened is obviously an embittered one, and the mere threat will have done much to aggravate the matter to the point of bringing it within the category of "disputes likely to lead to a rupture." In such a

case it would seem that under Article 12 the parties to the dispute have bound themselves to seek arbitration or judicial settlement or investigation by the Council. It would seem to be the duty of the Power which has made the threat to refrain from acting upon it as soon as it is satisfied that one of the processes provided for in the Covenant has been set in motion. Only in a case where vital damage has wrongfully been done to it and redress instantly necessary is only to be obtained by immediate action, can a State rightfully proceed to the serious measures of reprisal it has threatened. In such a case the Council should be notified at once in order to be able to deal immediately with the threatening situation. Such instances of real necessity could only be rare, and it would be the duty of the Council to satisfy itself that the State which had pleaded necessity had acted in good faith. Serious measures of reprisal would on the whole, therefore, be held in reserve till after the report of the arbitrators, Court or Council. They could be used as the milder alternative to war against the State which stubbornly refused to accept the findings of the body which had investigated the dispute.

S. Maccoby.

Note.—The question of the position of reprisals under the Covenant was raised in practice when Italy, as a reprisal for the murder of Italian soldiers on Greek territory, and after an offer of satisfaction by Greece which the Italian Government alleged to be insufficient, occupied Corfu (August-September, 1923). The Council of the League decided to appoint a Committee of Jurists to report upon the legal issues raised by the incident, but it is doubtful whether an authoritative report will appear.

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NOTES ON RECENT CASES.

CONTRACT—MUTUAL MISTAKE—RECTIFICATION OF A CONVEYANCE—STATUTE OF FRAUDS—EFFECT OF JUDICATURE ACT, 1873.

Craddock Bros. v. *Hunt.* [1922] 2 Ch. 809. C. A. [1923] 2 Ch. 136.

ROLLINGS bought two adjoining plots of land, hereinafter distinguished as Plot I. and Plot II., in 1877 and 1885 respectively. On part of Plot I. he built a house, known as Powlett House, which he let separately. The remainder of Plot I., together with the whole of Plot II., was by him leased to Greenstone, and this area was known locally as Greenstone's Yard.

In 1913 Rollings died. In July, 1920, Mr. and Mrs. Hinches, his personal representatives, sold Greenstone's Yard to the plaintiffs by auction, and Powlett House to the defendant by private treaty. Mr. Stirk, the vendor's solicitor, who had not been present at the auction, assumed that the land had been sold in the same lots as it was bought,

and without troubling to assure himself that this was so he made out the written memoranda of contract accordingly. The parcels in the plaintiffs' contract were copied from the deed of 1885, and those in the defendant's contract from the deed of 1877. Mr. George Craddock signed his firm's contract in the belief that it was correctly drawn; he was familiar with the yard, but did not know its area, and made no attempt to check the accuracy of the parcels. The defendant's solicitor, who had not seen the property, signed on his client's behalf. The solicitors of the respective purchasers drew up the conveyances in agreement with the memoranda of contract.

The defendant thus acquired a paper title to some 160 yards of Greenstone's Yard. That he himself was completely ignorant of this may be inferred from the fact that, although he immediately took up his residence in Powlett House, he made no attempt to assert rights of ownership over the rest of Plot I.; nor did he claim an apportionment of the rent paid by Greenstone to the plaintiffs.

The error was discovered by the plaintiffs' architect in April, 1921. The plaintiffs then informed the defendant, and requested him to execute a conveyance to them, at their expense, of the disputed area. This the defendant refused to do, and he now for the first time tried to enter on this land.

The plaintiffs then brought this action. They alleged that the land had been conveyed to the defendant by mutual mistake; that he took the conveyance with knowledge of the plaintiffs' prior equitable title; and that he thus became a trustee of the land for them. They asked that their conveyance should be rectified in accordance with the true intent of themselves and the vendors, and that the defendant should be ordered to convey the disputed portion of Plot I. to them.

P. O. Lawrence, J., gave judgment for the plaintiffs. His decision was upheld by the Court of Appeal (Lord Sterndale, M.R., and Warrington, L.J.; Younger, L.J., dissenting). The defendant was ordered to convey the land in dispute to the plaintiffs, and to sign an acknowledgment of their right to the production of the title-deeds of Plot I., together with an undertaking for the safe custody of the same.

The questions raised in the case may be summarized as follows:

(1) The interpretation of the indenture of conveyance between the vendors and the plaintiffs. The parcels in this deed ran thus: "All that plot of land situate in Powlett Street Wolverhampton to which it has a frontage of six yards and containing in the whole 332 square yards or thereabouts . . . which premises are now in the occupation of Mr. Greenstone." The area given is that of Plot I., but the remaining part of the description might refer equally well to Plot I. alone or to the whole of Greenstone's Yard. In the circumstances, P. O. Lawrence, J., held that the conveyance operated to pass the whole of Greenstone's Yard, the statement of the area being *falsa demonstratio quae non nocet*. With this very strained interpretation the Court of Appeal unanimously declined to agree; they upheld the decision of the learned Judge on the alternative ground next stated.

(2) The power of the Court to rectify the plaintiff's conveyance on the ground of mutual mistake. On this point there is considerable conflict of authorities.

Leuty v. *Hillas*, 2 De G. & J. 110, was a very similar case of the purchase of leaseholds. It differed from the present case in that the

memoranda of contract were correctly drawn, the mistake being only in the actual conveyances. Thus the Court, in ordering rectification of the deeds, was merely giving specific performance of a complete written contract, whereas in the present case it was desired to vary the contract by parol evidence, and then to have it specifically performed.

In *Woollam* v. *Hearn* (1802) 7 Ves. 211, Sir W. Grant, M.R., said that equity had already broken too far into the rules of law as to written contracts, and that, while a defendant resisting specific performance might adduce parol evidence to vary a writing, a plaintiff seeking specific performance could not be allowed to do so.

In *Squire* v. *Campbell* (1836) 1 My. & Cr. at p. 480, Lord Cottenham laid down the same rule, observing that the objection to parol evidence was even stronger when the contract had been carried out by the execution of a deed.

In *Davies* v. *Fitton* (1842) 2 D. & War. 225, Lord St. Leonards refused to admit parol evidence to vary a contract which had been embodied in a deed, observing that the point was so clear that it was against first principles to discuss it.

May v. *Platt* [1900] 1 Ch. 616, was an action on a covenant for title, the parcels being deficient. The conveyance agreed with a previous written contract. Farwell, J., following *Woollam* v. *Hearn* and *Davies* v. *Fitton*, refused to admit parol evidence of mistake, even as a defence to the action.

In *Thompson* v. *Hickman* [1907] 1 Ch. 550, Neville, J., held that he was bound by *May* v. *Platt* and *Davies* v. *Fitton*, but expressed himself as unable to follow the reasoning on which they were based. He distinguished between rectification and specific performance, observing that the former was a relief against the inflexibility of the common law, and the latter against the inadequacy of common law remedies. It would appear from this that rectification may be granted in a much wider range of cases than specific performance, though these two forms of equitable remedy are often very much involved with one another.

In *Henkle* v. *Royal Exchange Assurance Co.* (1749) 1 Ves. Sen. 317, Lord Hardwicke said that a written contract would be rectified on proper proof that it did not express the true intent of the parties. The standard of proof required would, however, be very high.

In *Baker* v. *Paine* (1750) 1 Ves. Sen. 456, the same learned Lord Chancellor asked: "How can a mistake in an agreement be proved but by parol evidence?" He went on to say that such evidence was not read to contradict the plain meaning of the writing, but to prove a mistake therein, which could not otherwise be proved.

In *Thomas* v. *Davis* (1757) 1 Dick. 301, it was laid down that parol evidence could be admitted to prove an original mistake or to construe general words.

In *Marquis Townshend* v. *Stangroom* (1801) 6 Ves. 328, Lord Eldon refused specific performance of a lease rectified by parol, but he seems to have admitted that on sufficiently convincing proof it might be allowed. He referred to *Henkle's Case, supra.*

In *Murray* v. *Parker* (1854) 19 Beav. 305, Romilly, M.R., said that the Court must exercise its jurisdiction in cases of mistake, wherever a deed, as executed, failed to express the real intention of the parties. He seems, however, to have held that, where a previous written agreement existed, it could only be explained, not varied, by parol evidence.

In *Olley* v. *Fisher* (1886) 34 Ch. D. 367, North, J., held that, at all events, since 1873, he could grant specific performance of a written contract rectified by parol in all cases where the Statute of Frauds did not create an obstacle. This case was followed in *Shrewsbury and Talbot Cab Co.* v. *Shaw* (1890) 89 L. T. J. 274.

In *Cowen* v. *Truefitt* [1899] 2 Ch. 309, the Court of Appeal rectified a lease wherein by mutual mistake No. 13 had been written for No. 14. In this case, however, the deed was absurd on the face of it, as it would have referred to a non-existent staircase, whereas in the present case the mistake was not apparent on the face of the conveyance.

In *Johnson* v. *Bragge* [1901] 1 Ch. 28, a marriage settlement was rectified in accordance with the orally expressed intention of the deceased settlor. Cozens-Hardy, J., held that the Statute of Frauds is no bar to the rectification of a deed in cases of accident or mistake.

It is quite impossible to reconcile these decisions. The conflict must be admitted, and it is hardly surprising that the Court of Appeal was divided. The Master of the Rolls and Warrington, L.J., elected to follow *Olley* v. *Fisher* and *Johnson* v. *Bragge*, and accordingly held that the Court has power to rectify a conveyance on parol evidence of mistake in reducing the contract to writing, and that this is so even where (as in the present case) the contract is within section 4 of the Statute of Frauds. Younger, L.J., preferred *May* v. *Platt*, and held that, even where the Statute of Frauds does not apply, the Court cannot give the relief asked for.

(3) Part performance. The operation of the Statute of Frauds, whatever its effect on the general doctrine of rectification, is excluded in this case by the equitable doctrine of part performance. Younger, L.J., denied that the entry of the plaintiffs on the land was in itself a sufficient part performance to exclude the statute; but be this as it may, their action in terminating Greenstone's tenancy certainly was sufficient: *Daniels* v. *Trefusis* [1914] 1 Ch. 788.

(4) The effect of the Judicature Act, 1873. The Master of the Rolls seems to have considered that the Judicature Act had enabled the Court to exercise its power of rectifying documents in a wider range of cases than before. A similar view was expressed by North, J., in *Olley* v. *Fisher*. It is difficult to see why this should be so. Either the power of rectification existed in a given case independently of the Act or it does not exist at all. Certainly it has been vested in all the divisions of the High Court instead of being confined to the Court of Chancery, but to facilitate its exercise is not to enlarge its scope. In *Britain* v. *Rossiter* (1879) 11 Q. B. D. 123, it was held by the Court of Appeal that the only effect of the Judicature Acts was to change the procedure, not to alter the rights of parties; and a similar view was expressed in *Lyell* v. *Kennedy* (1882) 20 Ch. D. 484. In *British South Africa Co.* v. *Companhia de Moçambique* [1893] A. C. 602, the House of Lords approved *Britain* v. *Rossiter* on this point; and in the present case Younger, L.J., delivering his dissenting judgment, said: "While the Judicature Act may enable you to do in one action what before the Act had to be done in two, I have difficulty in seeing how it enables you to do in one action something that before the Act you could not do at all."

H. H.

CONTRACT — SHIPBROKER — NEGOTIATION OF CHARTERPARTY — OPTION TO CHARTERERS TO PURCHASE AT NAMED PRICE—COMMISSION NOTE FOR BROKERAGE AT THAT PRICE—PURCHASE AT SMALLER PRICE—RIGHT OF BROKER TO BROKERAGE ON ACTUAL PRICE—QUANTUM MERUIT.

Howard, Houlder & Partners, Lim. v. *Manx Isles Steamship Co., Lim.* [1923] 1 K. B. 110.

THE plaintiffs in this case were shipbrokers. They negotiated with a third party, X, for a charterparty of the *Manx Isles* between the defendants and X. The terms, which were agreed on and actually appeared in the charterparty, were for a charterparty for five years at a fixed rate, with option to the charterers (X), at any time during the course of the charter, to purchase the vessel outright for £125,000. The plaintiffs took a very active part in bringing about this bargain, and the defendants gave them a commission note representing the bargain between plaintiffs and defendants. In this note the defendants covenanted to pay the plaintiffs 5 per cent. brokerage on the hire under the five years' charter, and, should the option of purchase contained in the charter be availed of by X, to pay 3½ per cent. brokerage on the sale. The charterparty was fulfilled for eight months when the defendants sold the ship to the charterers for £65,000. The plaintiffs made claims for commission, which were refused, and thereupon brought this action.

There are three points of law in this case which are of interest:

(i) Whether the defendants were liable to the plaintiffs for the commission on hire, of which they had deprived them (the plaintiffs) by the sale of the vessel;

(ii) Whether the plaintiffs could recover 3½ per cent. commission on the sale for £65,000, relying on the commission note; and

(iii) Whether the plaintiffs were entitled to remuneration as *quantum meruit* for services which they asserted had resulted in the sale.

These were the three alternative grounds on which the action was brought, and McCardie, J., gave judgment for the defendants on all of them.

(i) There is nothing in law which prevents the defendants from selling the ship, even though they thereby deprive the plaintiffs of their commission on hire. The House of Lords decision, in *French & Co.* v. *Leeston Shipping Co.* [1922] 1 A. C. 451, makes this rule definite, since in that case the facts were very similar, except that there was no definite option of sale at a definite price mentioned in the charterparty. In giving judgment in that case Lord Dunedin raised the question of a sale made in order to avoid payment of commission on hire; and although that has no application here, it is worth noticing that, in his opinion, an action would lie in such a case for recovery of such commission.

(ii) To recover on a commission note the plaintiffs must show that the conditions of the written bargain have been fulfilled. If that has not been done, it matters not that the plaintiffs prove expenditure of time, money, or skill. *Alder* v. *Boyle* (1847) 4 C. B. 635, *Bull* v. *Price* (1831) 7 Bing. 237, *Battams* v. *Tompkins* (1892) 8 Times L. R. 707, and *Mason* v. *Clifton* (1863) 3 F. & F. 899, 901, prove this rule. Here the note gives the plaintiffs the right to 3½ per cent. commission on sale if the option contained in the charter is complied with, *i.e.*, a sale for £125,000. The actual sale was for £65,000, and must have been a wholly distinct bargain

which the plaintiffs did not negotiate. Clearly, moreover, a sale for £125,000 is a very different matter from a sale for £65,000. A man contemplating the former may well agree to pay 3½ per cent. brokerage, but if he thought he could get no more than £65,000 for his ship he would be most unwilling to do so.

(iii) On this point the plaintiffs were not entitled for two reasons. Firstly, the facts were such that the plaintiffs were not the "efficient cause" of the sale at £65,000, as may be shown by applying the tests laid down in *Miller* v. *Radford* (1903) 19 Times L. R. 575, and in *Nightingale* v. *Parsons* [1914] 2 K. B. 621. In the former case, which was upon a question of commission for the sale of an estate to the lessee, the lease having been obtained by the plaintiffs' action, the judgment lays down the following rule: The action fails if the defendant can show *either* that, though the plaintiffs were his agents, they had not effected the sale, *or* that, though they had effected the sale, they were not his agents. Secondly, even had the plaintiffs been the "efficient cause" of the sale, they could not recover on *quantum meruit*, for there was no implied contract that they should do so, since the agreement was a definite one. In *Lott* v. *Outhwaite* (1893) 10 Times L. R. 76, where commission was to be paid on the completion of a sale, which was not completed, through no fault of the vendor, Lindley, L.J., said: "There can be no implied contract (s.c. for commission on *quantum meruit*) where there was an express contract." Here the commission note was the result of discussion between the plaintiffs and the defendants, and embodied their bargain. It was in writing; there was no collateral arrangement whatsoever. The rule *Expressum facit cessare tacitum* applies here, and there is no scope for the *quantum meruit* principle. In *Mason* v. *Clifton* (above) Cockburn, C.J., said: "If . . . B is employed (by A) to procure money on certain terms and . . . (procures it) upon other terms, then A will not be liable to him for commission. Nor can B . . . claim to recover reasonable remuneration for trouble and labour; for he has not done what he was employed to do." In *Martin* v. *Tucker* (1885) 1 Times L. R. 655, the plaintiff had chosen to make a bargain by which the right to their commission was to be dependent upon a condition. Coleridge, C.J., in giving judgment, said the plaintiffs "could not claim on *quantum meruit* because they had chosen to tie themselves down by the express terms of the agreement."

G. B. C.

CONTRACT—SALE OF UNDIVIDED PORTION OF LARGER BULK—DETERIORATION IN QUALITY BEFORE SEVERANCE—AT WHOSE RISK?

Sterns, Lim. v. *Vickers, Lim.* [1923] 1 K. B. 78.

THE Admiralty sold to the defendants a quantity of oil, which was in the custody of a storage company. Defendants sold part of the oil to the plaintiffs, who resold it to a third party. Defendants handed plaintiffs a delivery warrant, whereby the storage company undertook to deliver that quantity to the plaintiffs' order. Subsequently to the plaintiffs' acceptance of the warrant, and before the quantity purchased had been severed from the bulk, the spirit in the tank deteriorated in

quality. In an action for damages Shearman, J., held that the risk had not passed to the plaintiffs, and that the defendants were, therefore, liable for the deterioration.

This decision was reversed by the Court of Appeal.

The effect of the sale of an undivided portion of a larger bulk has frequently been considered before. In *Inglis* v. *Stock* (1885) 10 App. Cas. 363, it was argued that a person who had bought a certain number of tons of sugar, part of a larger stock, had no insurable interest in the quantity bought, because no specific bags had been appropriated to the contract and consequently the property in them had not passed. Lord Blackburn pointed out that, although the purchaser did not acquire the property in any particular number of tons of sugar, he did acquire an undivided interest in the larger bulk, and that undivided interest was held to be insurable.

In *Austen* v. *Craven* (1812) 4 Taunt. 644, the defendants sold to Kruse fifty hogsheads of sugar, part of a larger bulk. Kruse resold them to the plaintiff, and gave him a delivery order on the defendants, which they accepted. The plaintiff paid Kruse the price, but, as the defendants could not get payment from Kruse, they refused to deliver to the plaintiff. It was held by the Court of Common Pleas that the property had not passed, and that the plaintiff could not maintain an action of trover.

In the present case, two questions were raised—whether the property had passed, and whether the risk had passed.

The appellants contended that the property had passed to the plaintiffs on the sale and acceptance of the delivery warrant, notwithstanding that the quantity so sold had not been separated from the bulk, and that consequently the loss must fall on the purchasers. They further contended that, even had the property not passed, it was clear from the facts that the risk had.

The respondents argued that, if, as they maintained, the property had not passed, then neither had the risk, for section 20 of the Sale of Goods Act, 1893, says: "Unless otherwise agreed the goods remain at the seller's risk until the property therein is transferred to the buyer." This agreement to separate property and risk may, however, be inferred from the circumstances of the parties. "As a general rule," said Blackburn, J., in *Martineau* v. *Kitching* (1872) L. R. 7 Q. B. 453, "*res perit domino*, the old civil law maxim, is the maxim of our law, and when you can show that the property passed the risk of the loss *primâ facie* is in the person in whom the property is. If . . . you show that the risk attached to one person it is a very strong argument for showing that the property was meant to be in him. But the two are not inseparable. It may very well be that the property shall be in one and the risk in another." *Benjamin on Sale* states (p. 451) that "the general rule being that the risk attaches to the ownership of the goods, the parties may, by agreement, evince a different intention. And an agreement that one or other shall bear the risk may be inferred from their course of dealing or by usage binding on both. But an intention that the buyer shall assume the risk before the property has vested in him must be either expressed or clearly to be inferred from the circumstances." Bankes, L.J., in the present case, held such an inference to be clear. The transfer of an undivided interest carries with it the risk, at all events, after the vendor has given the purchaser a delivery order upon the party in possession of the goods and that party has

assented to it. Persons cannot put the risk, after acceptance of such a warrant, upon persons who have then no control over the goods, "for it seems plain that after the acceptance of the warrant the vendors would have no right to go to the storage company and request them to refuse delivery to the purchaser."

The case was decided purely on the question of the transfer of risk, and not on the question whether the property had passed. The Court seemed to think, however, that the property had not passed. The acquisition of an undivided interest in a larger bulk will not suffice to pass the property when the appropriation to the contract has to be made by the vendor himself: *Gillett* v. *Hill* (1834) 2 Cr. & M. 530. Does the acquisition of such an undivided interest pass the property so as to entitle the purchaser to sue for a conversion in a case where the power of appropriation is, as in this one, in a third party? "Probably not," said Scrutton, L.J.

D. E. P. E.

CONTRACT—BREACH—REMOTENESS OF DAMAGE—DUTY TO TAKE CARE.

Ellerman Line, Lim. v. *Smith's Dock, Lim.*
The Times, February 16, 1924.

THE plaintiffs' steamship *Crosby Hall* left Colombo with a large cargo of sugar on October 17, 1920. The following morning it was found that a quantity of water was in certain of the bilges and on further examination it was discovered that the cargo had been damaged. In respect of this damage the cargo-owners recovered £34,000 from the plaintiffs in this action: see *London Rangoon Trading Co.* v. *Ellerman Line, Lim.*, 39 T. L. R. 284.

The damage was caused by sea water, which entered the ship through a defective storm-valve connected with the captain's bath discharge pipe. The plaintiffs brought this action to recover the above amount from the defendants, alleging a breach of contract on the part of the defendants in that they had not properly repaired the ship while in their hands. The relevant part of the contract was an order to repair "all storm-valves and soil-pipes where necessary." This, the plaintiffs submitted, meant all storm-valves (of which there were nine) and all soil-pipes, further contending that "soil-pipe" meant "waste-pipe," and would therefore include the captain's bath discharge pipe. The defendants contended that the phrase meant all storm-valves to which soil-pipes were attached, of which there were six, and that soil-pipes meant w.c. pipes and nothing else. They further added that, even if they were liable for the breach of contract, the damage was too remote in that the plaintiffs had by their own negligence in not sounding the bilges at the proper times contributed to the amount of damage.

In reply, the plaintiffs submitted that they owed no duty to the defendants to sound the bilges, and that they were entitled to rely absolutely on the defendants' warranty as to the fitness of the storm-valves: *Mowbray* v. *Merryweather*, *infra*.

Bailhache, J., gave judgment for the defendants on the construction of the contract, holding that the phrase "all storm-valves and soil-pipes"

meant "all storm-valves to which soil-pipes are connected," and that soil-pipe meant "w.c. pipe." This disposed of the action, but His Lordship further remarked: "In case I am wrong about that, I had better go on to the next point taken by the defendants, which is this. They say: 'Even supposing we did contract to repair these storm-valves and did not do it and committed a breach of contract, yet you cannot complain of the damage for this reason: if the ordinary routine work of the ship had been carried out as it ought to have been, any leakage from this particular pipe would have been discovered as soon as the water reached the bilges, and you would then have put the pumps to work and no harm would have been done.'" His Lordship then decided this further point as follows:

(1) No doubt it is part of the ordinary routine of a ship that the bilges should be sounded twice daily.

(2) If this regular routine had been carried out, little, if any, damage would have been done to the cargo.

(3) But the fact that the plaintiffs did not take these soundings would not exempt the defendants from liability if they were guilty of a breach of contract in not repairing the valve, because the plaintiffs owed no *duty* to the defendants to go through the ordinary routine of a ship: *Mowbray* v. *Merryweather* [1895] 2 Q. B. 640.

Although the case was not decided on this latter point, nevertheless it opens up such a wide field for investigation that it is worth while considering it in detail. If His Lordship's contention be correct, then since the plaintiffs owe no duty to the defendants to conduct their ship properly, if the plaintiffs had never sounded the bilges and the boat had gone to the bottom, the defendants would have been liable for the total loss. This is the logical conclusion, because if the plaintiffs owe no duty at first they never owe a duty until they discover the damage, when they are compelled to minimize it. In other words, the plaintiff is entitled to plead: "I owe you no duty to conduct my ship in a seamanlike manner and to sound my bilges regularly; so long as I am ignorant of the damage resulting to the ship from your breach of contract, however careless I may be, if the damage I suffer is the direct result of your negligence, then you are liable, no matter what the extent." This is a startling construction of the law. What are the rules of damages as applied to cases such as those with which we are now concerned?

In tort the presence or absence of reasonable anticipation of damage determines the legal quality of the act as negligent or innocent. If it be determined that the act is negligent, then the question whether particular damages can be recovered depends only on the answer to the question whether they are the direct consequences of the act. The phrase "natural and probable result," which dominated the law of tort for so long, is no longer the law. Once you determine that there has been a breach of duty to take care, such breach, no matter how trivial, will render the wrongdoer liable for any damage which is the direct result, no matter how improbable such result may have been: *Polemis* v. *Furness, Withy & Co.* [1921] 3 K. B. 560; *Cambridge Law Journal*, Vol. I. p. 206.

"Given the breach of duty which constitutes the negligence and given damage as the direct result of the negligence, the anticipations of the person whose negligent act has produced the damage appear to me to be irrelevant": Bankes, L.J., *idem*, at p. 572.

In contract the following seem to be the principles:

(1) Where two parties have made a contract which one of them has broken, the damages which the other ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered either to arise naturally, *i.e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it: *Hadley* v. *Baxendale* (1854) 9 Ex. 341.

(2) If there be special circumstances under which the contract is made, and such are communicated by the plaintiffs to the defendant, and thus known to both parties, the damages resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under the special circumstances so known and communicated: *Mayne on Damages* (9th ed.), p. 12.

(3) Where there is a warranty by one party to another, such other party is entitled to rely absolutely on this warranty. The defendant will be liable for all damage arising from this breach of contract, even though the plaintiff could have discovered the defect by examining the goods, and so averted the resulting damage: *Mowbray* v. *Merryweather* [1895] 2 Q. B. 640.

"The defendant sets up in answer to the plaintiff's claim that there was an absence of due diligence on the part of the plaintiff. But there was no want of due diligence as between the plaintiff and the defendant, because, as I have said, the warranty means that, as between him and the plaintiff, the plaintiff may rely on the warranty. The only question appears to be, whether the damages claimed may be reasonably supposed to have been within the contemplation of the parties when the contract was made": Rigby, L.J., *idem*, at p. 644.

As regards the minimizing of damage:

(4) In *Grant* v. *Owners of S.S. Egyptian* [1910] A. C. 400, where the defendants' watchman, by pure negligence, so navigated the defendants' trawler as to cause a collision with the plaintiff's trawler, and, instead of examining the trawler, the plaintiff so neglected his duty that the trawler in consequence sank in the dock, it was held that, though the defendants were liable for the damage caused by the collision, they were not liable for the foundering of the plaintiff's vessel, it having been proved that the vessel need not have sunk if the plaintiff had examined the trawler immediately.

"In these cases two principles too often put separately, but really conjoined, may be stated, namely, that the defendants are liable for the damage which is the natural and direct consequence of their wrongful act. The second principle is that the defendants are not liable for any further damage, which could have been avoided or minimized by the exercise of reasonable care on the part of the plaintiffs. This is really not a separable proposition from the other in the sense of being independent of it; it is only a development of the former proposition, because the latter further damage is caused not by the natural consequence of the defendant's act, but by reason of the neglect of that care which was reasonable in the circumstances on the part of the owners": *per* Lord Shaw, *idem*, at p. 402.

(5) In a similar case, *The Bruxellesville* [1908] P., Bucknill, J., at p. 319, said:

"The first, and in fact the only, inquiry in these cases is whether the damage complained of is the natural and reasonable result of the defendant's act. It will assume this character if it can be shown to be of such consequence as in the ordinary course of things would flow from the act."

(6) There is an implied warranty in all contracts (called a covenant in law) that the parties will act as prudent men would act. This is distinguished from an express contract to so act: *The Moorcock*, (1889) 14 P. D. 64.

Even if the defendants in the case with which we are here concerned were guilty of a breach of contract, it is submitted that:

(*a*) The plaintiffs owed an implied duty to the defendants to conduct their ship in a seamanlike manner as reasonable men would conduct a ship, and when they failed to sound the bilges they were not so behaving: *The Moorcock, supra.*

(*b*) That such damage as resulted was not within the contemplation of the parties when the contract was made; it was not such a result (at any rate, as regards *degree*) which would naturally follow from the defendants' breach of duty: *Hadley* v. *Baxendale, supra.*

(*c*) It is admitted that the plaintiffs were entitled to rely on the defendants' warranty absolutely (*Mowbray* v. *Merryweather, supra*), and owed no duty to the defendants to examine the valve; but this case only decides the question of the existence of a liability arising from such breach, and not the *extent* to which the defendants would be liable.

(*d*) The principle that the plaintiff owes a duty to the defendant to minimize damage of which he is aware (*Grant* v. *Owners of S.S. Egyptian, supra*) applies where the plaintiff *ought* to have known of the existence of damage, and that the plaintiff cannot, by pleading his own negligence, render the defendant liable for such damage as would have been avoided but for such negligence.

H. M. A.

Contract — Shipping — Charterparty — Demurrage — Principal and Agent—Signature by "Charterers" "As Agents"—Signatories Described as "Charterers" in Body of Charterparty—Personal Liability of Agents.

Universal Steam Navigation Co., Lim. v. *James McKelvie & Co.*
[1923] A. C. 492.

A charterparty was expressed to be made "between T. H. Seed & Co., Lim., agents for the owners" of a steamer, and "James McKelvie & Co., charterers," and was signed "For and on behalf of James McKelvie & Co. (as agents) J. A. McKelvie."

Though the name of the real principal was undisclosed in the charter, the owners of the steamer were aware that James McKelvie & Co. were acting for other persons.

The steamer was to load coal and to proceed to a foreign port, and the "charterers" agreed to pay demurrage for delay at either port. The steamer was delayed; and in an action by the owners against James McKelvie & Co. it was held, on appeal to the House of Lords, that the defendants, having signed "as agents," were not liable as principals for demurrage, notwithstanding that they were described as "charterers" in the body of the charterparty.

This case raised the question of the construction of the entire charter, including the form in which it was signed, namely, in the name of James McKelvie & Co. "(as agents)."

Do the words "as agents," added to the signature, save a party signing for a principal from personal liability on the contract or not?

In the present case they were held to do so. They were considered words of limitation, and not a mere part of the act of signifying assent and closing a negotiation by signing a name. They were words clearly meant to limit and explain a liability, and are more than a mere "per procuration," which only alleges authority to write another's name. They were more, too, than mere words of description of the signatory's business. Had the words been "agents" only, it might have been argued that this was so, but the words "as agents" seem clearly to indicate that the words mean something other than a description of business.

The case of *Gadd* v. *Houghton* (1876) 1 Ex. D. 357, is in point. There the words "on account of" were used in the body of the charterparty, and an ordinary signature, without any description of agency or otherwise, was appended.

James, L.J., held that the words "on account of" were the very strongest terms the English language afforded to show that the agent was not binding himself, but his principal. Later, when commenting severely on the decision in *Paice* v. *Walker*, L. R. 5 Ex. 173, he stated that, in his opinion, the words "as agents" conveyed the same meaning as the words "on account of," adding that, where the signature comes at the end, you apply it to everything that occurs throughout the contract.

The only authority against the present decision is that in *Lennard* v. *Robinson* (1855) 5 E. & B. 125, a case very similar to the present one, where the party charged had signed "By authority of, and as agents for," and in that case the agents *were* held liable. There being but minute distinctions between that case and the present one, that decision must now be held to be overruled.

H. A. C.

CORPORATION—DOCTRINE OF ULTRA VIRES—BUSINESS OF GAS COMPANY—RESIDUALS.

Deuchar v. *Gas Light and Coke Co.* *The Times*, March 18, 1924.

THE Gas Light and Coke Co. was a company carrying on business under a number of private Acts of Parliament, the most pertinent of which are the Gas Light and Coke Company Acts, 1868 and 1876.

By section 40 of the Act of 1868 the company was authorized to "make and supply gas, and to convert, manufacture and deal with,

sell and dispose of coke, tar, coal, pitch . . . and all other products refuse or residuum arising or produced by the making of gas."

By section 64 of the Act of 1876 the company was authorized to purchase and maintain appliances, and to use all such works for dealing with residuals as they might require or deem necessary or expedient for efficiently and economically carrying on their undertaking.

The company required caustic soda for the purpose of treating their residuals. Previously they had bought it, but now in the interests of economy they had set up a factory in which to make it for themselves.

This was an action brought by the secretary of a chemical manufacturing company, who had bought shares in the gas company for the purpose of the action, asking the Court to restrain the company from continuing the manufacture of caustic soda as being *ultra vires* the company.

The law on this subject is contained in a series of cases:

In *Ashbury Railway Co.* v. *Riche* (1875) L. R. 7 H. L. 653. A company was formed to make and sell railway carriages and waggons and railway plant, and to carry on the business of mechanical engineers and *general contractors*, and to purchase mines and lands, and to buy and sell timber and coals and other specified objects. It was held that the words "general contractors" must be read as referring to such contracts, and to such contracts only, as were incidental to the business of a mechanical engineer.

In *Att.-Gen.* v. *Great Eastern Railway Co.* (1880) 5 App. Cas. 473, this principle was again recognized in the House of Lords, but was qualified by a rule laid down by two of the Law Lords to the effect that the principle was one to be reasonably, and not unreasonably, understood and applied, and whatever may be fairly regarded as incidental to or consequential upon those things which the Legislature had authorized (that is, those things specified in the memorandum as objects) ought not, unless expressly prohibited, to be held by judicial construction to be *ultra vires.*

In *London County Council* v. *Att.-Gen.* [1902] A. C. 165, Lord Halsbury, referring to the two cases above, said: "I think now it cannot be doubted that those two cases do constitute the law upon the subject. It is impossible to go behind those two cases."

In *Att.-Gen.* v. *Mersey Railway Co.* [1907] A. C. 415, a railway company, without express powers to run omnibuses, ran such omnibuses in a way not incidental to and consequential upon their statutory powers, and were restrained from doing so.

In the present case, the action was dismissed by Astbury, J., who held that the real test as to whether the act was *ultra vires* the company was not that of necessity or convenience, but whether the thing objected to was really incidental to the statutory objects. There was no suggestion that the company intended to set up as dealers in caustic soda. The word "manufacture" must be given a wide meaning, and if the directors thought it necessary for carrying on their business they were entitled to manufacture caustic soda.

This case is simply an example of the rule suggested in *Att.-Gen.* v. *Great Eastern Railway Co.*—that the principle in the *Ashbury Case* is to be reasonably understood and applied.

J. C. P. B.

EVIDENCE — PRISONER'S CHARACTER — CRIMINAL EVIDENCE ACT, 1898, S. 1 (*f*)—CRIMINAL APPEAL ACT, 1907, S. 4.

Rex v. *Redd.* C. C. A. [1923] 1 K. B. 104.

THIS was an appeal from a conviction at the quarter sessions for the county of Northampton on charges of housebreaking and larceny.

At the trial at the sessions defendant, who was not represented by counsel, called as a witness one Williams, solely with a view to the production of certain letters. Williams, without any question being put by defendant, proceeded to make a voluntary statement to the effect that defendant held a good position in the Army as a warrant officer, and, to the best of witness's knowledge, was "quite all right."

Counsel for the Crown then said that, as evidence of good character had been given, he proposed to cross-examine as to defendant's real character. He accordingly asked whether witness was aware that defendant had been previously convicted on eleven occasions, and twice sent to penal servitude. Witness replied that he was not aware of this.

No attempt was made by the prosecution to prove these convictions, nor were they again referred to.

Defendant also gave evidence on his own behalf, but said nothing about his character. He was cross-examined as to the number of times he had deserted from the Army.

The jury convicted defendant, who appealed on the ground that the cross-examination of the witness Williams should not have been allowed. The appeal was heard before the Lord Chief Justice (Lord Hewart), Avory and Sankey, JJ.

Avory, J. delivered the judgment of the Court, which held that the appeal must be allowed and the conviction quashed.

The objection to the questions put to the witness Williams in cross-examination was based on the common-law rule excluding evidence of a prisoner's bad character. To this rule there are various exceptions, one of which is thus stated in *Archbold's Criminal Pleadings* (26th ed.), p. 366:

"And if the prisoner endeavours to establish a good character, either by calling witnesses himself, or by cross-examining the witnesses for the prosecution, the prosecution is at liberty, in most cases, to give proof of the prisoner's previous convictions."

It was on this exception, apparently, that counsel for the Crown relied, but in this case the appellant himself had made no attempt whatever to establish a good character. In *Reg.* v. *Gadbury* (1838) 8 C. & P. 676, evidence of good character had been elicited by a question put by counsel for the defence; but inasmuch as there was some doubt as to whether the question had been put with that intention, cross-examination was not allowed. *A fortiori* it should have been excluded in the present case, where no question had been put to the witness at all.

It was further held that the cross-examination of the defendant himself was contrary to the provisions of the Criminal Evidence Act, 1898, section 1 (*f*) of which runs as follows:

"A person charged and called as a witness in pursuance of this Act shall not be asked, and if asked shall not be required to answer, any question tending to show that he has committed or been convicted of or

been charged with any offence other than that wherewith he is then charged, or is of bad character, unless

"(i) the proof that he has committed or been convicted of such other offence is admissible evidence to show that he is guilty of the offence wherewith he is then charged; or

"(ii) he has personally or by his advocate asked questions of the witnesses for the prosecution with a view to establish his own good character, or has given evidence of his good character, or the nature or conduct of the defence is such as to involve imputations on the character of the prosecutor or the witnesses for the prosecution; or

"(iii) he has given evidence against any other person charged with the same offence."

Clearly none of these exceptions applied to the defendant in this case, who had never raised the question of character at all. Evidence of his good character had certainly been given; but the statute requires that it shall be given by the prisoner himself, or at his instance or that of his advocate. Even had he called the witness Williams expressly as a witness to character, he would not have brought himself within the terms of the section.

It was, however, submitted on behalf of the Crown that, even though improper questions had been asked, they had not affected the verdict, and that the jury would in any case have convicted. The Court of Criminal Appeal has a discretion under section 4 of the Criminal Appeal Act, 1907, which provides that:

"The Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favour of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred."

Counsel for the Crown asked that the Court should exercise its discretion and dismiss the appeal, but the Court held that the present case was not governed by the proviso. Avory, J., referred to *Rex* v. *Hemingway* (1912) 8 Cr. App. R. 47, 48, and *Rex* v. *Ratcliffe* (1919) 14 Cr. App. R. 95, 99.

In *Rex* v. *Hemingway* the deputy chairman of the London County Sessions had quite unintentionally elicited from the defendant a confession of a previous conviction. He directed the jury to disregard it, and summed up in the defendant's favour, but the jury convicted. In the Court of Criminal Appeal Lord Alverstone, L.C.J., said: "This information ought not to have been before the jury. . . . In a case where the evidence was slight, the knowledge of a previous conviction may have influenced the jury. It is better that a guilty person should escape than that an innocent one should be convicted. This conviction will be quashed."

In *Rex* v. *Ratcliffe* Lord Reading, L.C.J., said that the Court was not satisfied that, had certain improper questions not been put, the jury's verdict must have been the same. The fact that the jury might have convicted was not sufficient to justify the Court in applying the proviso contained in section 4 of the Criminal Appeal Act, and the conviction was accordingly quashed.

Avory, J., said that, in the present case, there was, doubtless, substantial evidence to support a conviction, apart from the improper evidence; but the Court was not prepared to say that the jury must

necessarily have convicted, as they must in some measure have been influenced by the questions put to the witness Williams. There was room for doubt, and the conviction must be quashed.

H. H.

Interpretation of Statute—Gaming—Cheques Given for Racing Bets —Action for Repayment—Cause of Action Arising under Statute before its Repeal—Action Brought after Repeal—Gaming Act, 1835, s. 2—Interpretation Act, 1889, s. 38—Gaming Act, 1922, s. 1.

Henshall v. *Porter.* (1923) 39 L. T. R. 409.

The Gaming Act, 1922, repeals section 2 of the Gaming Act, 1835, and provides that no action under the repealed section to recover back money paid in respect of gaming debts "shall be entertained in any Court." This Act came into force on July 20, 1922.

The plaintiff brought an action to recover £333 on five cheques paid by him to the defendant for bets made on horses in 1919. The writ in the action was issued on February 3, 1923.

Thus the causes of action had arisen before the Act of 1922 came into operation, whereas the writ was issued after the Act came into force.

It was admitted that, under section 2 of the Gaming Act, 1835, as interpreted in *Sutters* v. *Briggs* [1922] 1 A. C. 1, the plaintiff was entitled to succeed, unless his causes of action were barred by the Gaming Act, 1922.

McCardie, J., held that the plaintiff's cause of action vested in him before the Act of 1922 came into force, and was not divested on the Act coming into force, and that he was entitled to recover.

This case illustrates the principles relating to the retrospective operation of statutes regarding rights, namely:

(1) The Interpretation Act, 1899, s. 38, which provides that, where any Act passed after 1889 repeals any other enactment, then, unless a contrary intention appears, the repeal shall not affect any right acquired under any enactment so repealed.

(2) A statute shall not be construed so as to have a retrospective operation, unless an intention to that effect is expressed in plain and unambiguous language. Existing rights are not to be deemed destroyed by a statute, unless there be express words or the plainest implication to that effect: *In re Athlumney* [1898] 2 Q. B., *per* Wright, J., p. 551.

The case of *Gillmore* v. *Shooter*, 2 Mod. 310, illustrates this. By the Statute of Frauds, 1677, "No action shall be brought" in certain cases without an agreement in writing. The plaintiff had no writing to support his cause of action, which had accrued before the statute was passed. He commenced his action after the statute became law. *Held*, that the words "no action shall be brought" did not debar the claim, because "it could not be presumed that the Act had a retrospective operation, so as to destroy accrued claims."

There is no distinction between the words "no action shall be brought" and "no action shall be entertained." When taken alone, they may appear to favour the defendant's contention. But the learned Judge

observes that "the Act can only be read as a consistent whole if these words are regarded merely as an emphatic assertion of the intention of the Legislature that after July 20, 1922, a writ issued after that date for a cause of action alleged to arise after that date under section 2 of the repealed Act of 1835 shall be at once set aside."

In *Vacher & Sons, Lim.* v. *London Society of Compositors* [1913] A. C. 107, the alleged cause of action arose after the passing of the Trade Disputes Act, 1906, which provides in section 4 that "an action against a trade union . . . in respect of any tortious act alleged to have been committed by or on behalf of the trade union shall not be entertained. . . ." The Court summarily dismissed the action.

In *Smithies* v. *National Association of Operative Plasterers* [1909] 1 K. B. 310, it was held that section 4 of the Trade Disputes Act was not retrospective so as to prevent the further maintenance of an action against a trade union which had already been commenced before the passing of the Act.

Bowling v. *Camp*, 39 L. T. R. 31, affirmed by the Court of Appeal in *Beadling* v. *Goll*, 39 L. T. R. 128, decided that the Gaming Act, 1922, s. 1, did not prevent the continuance of an action which had been commenced before the Act came into force, and in which judgment had not been given.

Knight v. *Lee* [1893] 1 Q. B. 41, covers the present case. It turned upon the interpretation of the Gaming Act, 1892, which enacted that a promise to repay a person moneys paid by him on a wager, void under the Gaming Act, 1845, should itself be void, and provided that "no action shall be brought or maintained" to recover any such sum of money. The plaintiff paid losses on the defendant's behalf before the Act of 1892 was passed, but did not issue his writ till after the Act was passed. It was held that the action was rightly brought, and that the Act did not destroy the vested claims or bar the commencement of fresh actions to enforce them.

The question of the policy of the Gaming Act, 1922, does not assist in the interpretation of the Act. It is not clear whether the object is to encourage betting or not; and anyhow the question of policy is for Parliament, and not for the Courts.

Hence by the joint effect of the Interpretation Act, 1889, and overwhelming authority, the vested rights of the plaintiff remained unaffected by the Gaming Act, 1922.

T. E. L.

INTERPRETATION OF STATUTE—LANDLORD AND TENANT—RENT RESTRICTIONS—EXCLUSION TEST AS TO QUANTITY OF FURNITURE REQUIRED—INCREASE OF RENT AND MORTGAGE INTEREST (RESTRICTIONS) ACT, 1920, s. 12, SUB-S. 2, PROVISO 1.

Wilkes v. *Jones and Goodwin.* (1923) L. T. R. 262; [1923] 2 K. B. 86.

THIS case turned upon the interpretation of section 12, sub-section 2, proviso 1 of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, which provides: "This Act shall not, save as otherwise

expressly provided, apply to a dwelling-house *bonâ fide* let at a rent which includes payments in respect of board, attendance, or use of furniture."

In October, 1920, the owner of a dwelling-house, of which the standard rent was £55, let a portion of it as a maisonette to a tenant at a quarterly rent of £32 10s., with an additional £1 5s. per quarter for the use of the linoleum laid on the floors of four out of the five rooms.

A new agreement was made in January, 1921, whereby the tenant held the same premises at a quarterly rent of £20, "to include the use of linoleum."

An application by the tenant to have the rent apportioned raised the question whether the premises were exempted from the operation of the Act of 1920 on the ground that they were *bonâ fide* let at a rent which included payments in respect of the use of furniture within the meaning of section 12 (*supra*).

The linoleum was the only article susceptible of the description of "furniture."

The case was tried by the Registrar, the County Court Judge, and by Avory and Salter, JJ., in the Divisional Court, resulting, as Bankes, L.J., observed, "in a strange conflict of judicial opinion."

Finally, the tenant appealed to the Court of Appeal. It was held (*per* Bankes and Scrutton, L.JJ.) that, unless the furniture, for the use of which payment is made, is so trifling in value or in amount as to be negligible, the dwelling-house is thereby taken out of the Act; but (*per* Younger, L.J.) that it is taken out of the Act, by payment for the use of furniture, only where the amount of furniture is such as to require the Judge to say that the house is no longer an unfurnished house.

Two tests are applied to ascertain whether the premises fall outside the statute:

(1) There must be a rent which includes payment for the use of furniture.

(2) There must be a *bonâ fide* letting.

The application of the tests depends on questions of fact, which are for the County Court Judge to decide.

The word "furniture" must be construed in its ordinary meaning. It was agreed that linoleum came within the popular meaning of "furniture." But, further, the amount must be substantial enough not to be excluded by the rule *de minimis non curat lex*.

It may be noted that in *Wallace* v. *Hardingham* "linoleum" was held not to be "furniture," because in that case the parties treated it as "fixtures." In *Crane* v. *Cox*, 39 L. T. R. 204, it was held that a small piece of linoleum was not "furniture." Bailhache, J., held that there must be a substantial quantity, or a series of pieces of furniture, to take the premises out of the Act.

The *bona fides* of the letting is a question of intention, and involves a consideration of the amount of furniture.

"If the amount of furniture said to be included in the rent is so small as to be negligible it would go far to disprove the *bona fides* of the letting, but showing that the agreement about it is nothing but a collusive agreement, to take the case out of the Act by inserting a sham term in the tenancy."

There must be a real charge in respect of the furniture in order to satisfy the *bona fides*. Where there is such a charge, it is immaterial

that the tenant had no option but to pay it. If the parties honestly intend to include the use of the "furniture" in the consideration for the rent, it is immaterial that they thereby evade the Act.

Younger, L.J., points out that the Rent Acts are tenants' Acts; and it is unlikely that the Legislature would exclude from the benefits, except on substantial grounds, tenancies to which otherwise they would apply.

In *Kerr* v. *Bryde* [1923] A. C. 1, the House of Lords construed section 3 of the Act in favour of the tenant by holding that a landlord is not entitled, under section 3, sub-section 2 of the Act of 1920, to an increase of rent, unless the tenancy has first been determined, the service of a valid notice of increase alone being insufficient.

The Act should be construed in favour of the tenant. If the use of a minimum amount of furniture is allowed to take the premises outside the Act, the tenant has no protection from the words *bonâ fide*, which were first introduced by the Act of 1920.

In *Wood* v. *Wallace*, 37 L. T. R. 147, and *Hocker* v. *Solomon*, 91 L. J. Ch. 8, it was held that a tenancy agreement providing for a separate payment for the use of furniture, instead of a lump sum to include rent and furniture, did not bring the premises within section 12, proviso 1.

In the present case, the Court of Appeal cast some doubt upon these decisions.

McCardie, J., in the later case of *Rimmer* v. *Carson*, 39 L. T. R. 349, held that the "*de minimis* rule" must be applied in favour of the tenant.

The Increase of Rent and Mortgage Interest Restrictions (Continuance) Act, 1923, s. 10, sub-s. 1, provides "that a dwelling-house shall not be *bonâ fide* let at a rent which includes payments in respect of . . . use of furniture, unless the amount of rent which is fairly attributable to the . . . use of furniture, regard being had to the value of the same to the tenant, forms a substantial portion of the whole rent."

This changes the *de minimis* rule, laid down in *Wilkes* v. *Goodwin*, as to the amount of furniture, and restores the principle of *Crane* v. *Cox*—that the amount of furniture must be substantial in order to take the premises outside the Act.

Wilkes v. *Goodwin* contains some observations as to the authority of sidenotes in statutes.

Avory, J., in the Divisional Court, attached importance to the language of a sidenote to section 12 as indicating the intention of the Legislature.

"The rule as to the rejection of sidenotes for the purposes of interpretation is now of imperfect obligation": Maxwell, *Statutes* (6th ed.), p. 76.

Sidenotes, however, are not a part of the statute; they are misleading guides, and too much reliance is not to be placed on them.

T. E. L.

INTERPRETATION OF STATUTE—FERTILIZER AND FEEDING STUFFS ACT, 1906—SALE OF "SALVAGE" AS FERTILIZER—FAILURE TO GIVE INVOICE—LEGALITY OF SALE.

Anderson, Lim. v. *Daniel.* 40 T. L. R. 61.

By section 1, sub-section 1 of the Fertilizers and Feeding Stuffs Act, 1906, "Every person who sells for use as a fertilizer of the soil any article . . . which has been imported from abroad shall give to the purchaser an invoice stating the name of the article and what are the respective percentages (if any) of nitrogen, soluble phosphates, insoluble phosphates and potash contained in the article and the invoice shall have effect as a warranty to the buyer that the actual percentages do not differ from those stated in the invoice beyond the prescribed limits of error."

By section 6, sub-section 1, "If any person who sells any article for use as a fertilizer of the soil . . . commits any of the following offences, namely:—(*a*) Fails without reasonable excuse to give, on or before or as soon as possible after the delivery of the article, the invoice required by this Act . . . he shall, without prejudice to any civil liability, be liable on summary conviction" to a penalty.

Plaintiffs sold and delivered to the defendant a quantity of "salvage" (a trade name applied to the sweepings of the holds of ships which have carried cargoes of sodium nitrate, ammonium sulphate, potash, superphosphates, and basic slag), which is used as a fertilizer of the land. No invoice was given to defendant at the time of sale, or at any time thereafter, to show the respective percentages of the chemical ingredients. The price at which the goods were sold was below that of ordinary manures. A considerable time after the stuff was delivered the vendors sued the purchaser for the price.

The County Court Judge found for the vendors. In the Divisional Court Salter and Lush, JJ., disagreed. The Court of Appeal allowed the appeal.

There is no question that a contract prohibited either expressly or impliedly by statute is illegal. Buckley, J., in *Victorian Daylesford Syndicate, Lim.* v. *Dott,* 21 T. L. R. 742, divided statutes for this purpose into two classes:

(1) Those in which a penalty is imposed against doing an act for the purpose only of the protection of the revenue; and

(2) Those in which a penalty is imposed upon an act, not merely for revenue purposes, but also for the protection of the public.

The question, therefore, is whether the contract was one which by implication was prohibited under the terms of the statute. It was held that in this case, the penalty being imposed for the protection of the public, failure to comply with the requirements of the statute rendered the contract illegal (unless a "reasonable excuse" for non-compliance was forthcoming), and accordingly the price could not be recovered. Counsel for the vendors argued that, as the statutory provision did not relate to something to be done at or before the delivery, but to something to be done subsequently, then failure to obey it could not render illegal a contract which was legal at the time it was made.

This argument is met by *Bensley* v. *Bignold,* 5 B. & Ald. 335. This case concerned a contract to print books. Printers are required by statute

to print on books their name and address. Under the contract the printer delivered a book which had not got his name and address printed on it. When he sued for the price, it was held that he could not recover, because performance in that way, being in breach of a statute, was illegal, and no rights could be recovered in respect of a contract illegally performed.

The "reasonable excuse" for omission to send an invoice submitted by the vendors was that, owing to the heterogeneous composition of this fertilizer, such a large number of samples would have to be taken that it was not commercially worth while to analyse it. This was rejected, as the policy of the statute was to prevent the selling of fertilizers whose composition was unknown to the purchaser.

Another case (this one in tort) raising the question of the inferences necessarily to be drawn from a penal statute is the well-known *Gorris* v. *Scott* (1874) L. R. 9 Ex. 125. There the plaintiff sued the defendant, a shipowner, for the loss of sheep, which were swept overboard as a consequence of defendant's neglect to provide certain pens and structures for the accommodation of the sheep on the deck of the ship. The object of the statutory requirements was to prevent the spread of contagious diseases among the animals. It was laid down that an action for damages will not lie when the damage is of such a nature as was not contemplated by the statute, or where the injured person is not one of those for whose protection and benefit the statute was passed.

D. E. P. E.

Mistake—Recovery of Money Paid by Mistake—Mistake of Fact or Law — Estoppel — Alteration of Payee's Position — Equitable Ground for Recovery.

Holt v. *Markham.* [1923] 1 K. B. 504.
Scottish Metropolitan Insurance Co. v. *P. Samuel & Co.* [1923] 1 K. B. 348.

These two cases turn upon the law as to the recovery of money paid by mistake.

Holt v. *Markham.*

The plaintiffs, who were bankers and Army agents authorized to pay gratuities at a fixed scale to demobilized officers, brought an action against the defendant for the recovery of certain money they had paid him under a mistaken belief as to his status.

Five months after payment the plaintiffs applied to the defendant for the return of part of the money, basing their application on an erroneous ground, which the defendant successfully answered. The defendant was not aware that he was not entitled to all the money, and, receiving no further communication from the plaintiffs, he invested it in a company which afterwards went into liquidation.

Two months later the plaintiffs again demanded repayment, this time correctly claiming that the money had been paid under a mistaken belief that the defendant was not upon the Emergency List.

At the trial Lush, J., gave judgment for the defendant on three grounds:

(1) The mistake was not as to the status of the defendant, but as to the construction of official orders. This is a mistake of law.

(2) It was not against good conscience for the defendant to retain the money.

(3) As the defendant had been induced to believe that he was entitled to the money paid to him, and in that belief had altered his position by spending it, the plaintiffs were estopped by their conduct from relying on their mistake. *Skyring* v. *Greenwood* (1825) 4 B. & C. 281 followed.

The plaintiffs appealed. In the Court of Appeal Bankes and Warrington, L.JJ., upheld the decision of the lower Court. Scrutton, L.J., also found for the respondent, but based his judgment simply on estoppel. His *dicta* in criticism of the other two grounds on which the case had been decided were as follows:

(1) That the mistake was one of law and not of fact.

The mistake was partly of fact and partly of law, because the appellants were wrong both in the application and in the construction of the orders.

(2) That the respondent was not in conscience bound to return the money.

The introduction of equitable considerations into cases of this kind was the unfortunate result of Lord Mansfield's ruling in *Sadler* v. *Evans*, 4 Burr. at p. 1986, viz.: "It is a liberal action founded on large principles of equity where the defendant cannot conscientiously hold the money; the defence is any equity that will rebut the action."

Commenting on this view, Scrutton, L.J., said: ". . . since that time the whole history of this form of action has been what I may call a history of well-meaning sloppiness of thought." He quoted with approval the *dicta* of Lord Sumner in *Baylis* v. *Bishop of London* (1912) 82 L. J. Ch. at p. 67: ". . . to ask what course would be *ex aequo et bono* to both sides was never a very precise guide; and as a working rule it has long since been buried in *Standish* v. *Ross* and *Kelly* v. *Solari*."

[Note on *Kelly* v. *Solari* (1841) 11 L. J. Ex. 10: This case, although it limited, cannot be said to have "buried," the rule in *Sadler* v. *Evans*. The Court held that, although it was a hard case, the defendant being a widow who had satisfied her late husband's debts with life insurance money paid under mistake of fact by the plaintiff company, the defendant was not exempted on equitable grounds from repayment. Parke, B., added: "It is difficult to understand how any party can conscientiously retain money which has been paid to them under a mistake."]

Scottish Metropolitan Assurance Co. v. *P. Samuel & Co.*

The Talbot Steamship Co. instructed the defendants, a firm of brokers, to insure the s.s. *Dorothy Talbot* for £20,000. The defendants divided the policy amongst several insurance companies, the plaintiff company subscribing for £1,600. An accident occurred to the ship, and the plaintiffs paid £496 in respect of a particular average loss. Subsequently the plaintiffs discovered that other companies which had subscribed to the policy had refused payment on the ground that the loss was not a fair loss, and that the policy was therefore void. The plaintiffs then demanded a return of the money, asserting that it had been paid under a mistake of fact. The defendants refused payment on the ground that the steamship company owed them a larger amount for premiums, and that they had set off the money paid by the plaintiff against the unpaid premiums. There had been no settled account between the parties.

The facts are almost identical with those in *Buller* v. *Harrison* (1777) 2 Cowp. 565. The *ratio decidendi* in that case was that "the mere passing of money to the credit of an account where there is no settled account is not such a payment by an agent as will excuse him from repaying money which his principal is not entitled to retain."

Defending counsel in the present case developed an argument which is equally applicable to *Buller* v. *Harrison*. He contended that, since a broker has a lien for unpaid premiums upon moneys of the assured coming into his hands, the defendants, by crediting the steamship company to the extent of the amount received from the plaintiff, had given up their lien, and therefore their position was altered to their detriment. Bailhache, J., admitted the legality of the brokers' lien, but pointed out that in this case the money, being paid under a mistake of fact, was not the money of the assured, and therefore the defendants never had a lien on it.

The implication, however, is that, if the money had been actually paid over to the steamship company, the defendants would have been protected by the fact that their position had been altered for the worse. In *Buller* v. *Harrison* Lord Mansfield, in giving judgment for the plaintiff, said: "The present case turns upon this: that the agent was in precisely the same situation at the time when the mistake was discovered as before." It is important to note that he adds: ". . . and in conscience the defendant is not entitled to retain the money."

The law as to the recovery of money paid under mistake of fact may be summarized thus: The general rule, as laid down in *Kelly* v. *Solari*, is that, "where money is paid to another under the influence of a mistake, that is, upon the supposition that a specific fact is true which would entitle the other to the money, but which fact is untrue, an action will lie to recover it back." The rule is subject to at least three exceptions:

(1) If the defendant is induced by the subsequent conduct of the plaintiff to believe that he is entitled to the money, and then spends it, the plaintiff is estopped from recovering it.

(2) If the defendant has altered his position for the worse as a result of a mistake, the plaintiff is barred from recovering.

(3) The plaintiff is barred from recovering if it would be against good conscience to do so. For the same reason the defendant may be barred from retaining. This exception has been so much limited, particularly by *Kelly* v. *Solari* and *Baylis* v. *Bishop of London*, that it can be safely applied only to cases where the facts are similar to those in *Sadler* v. *Evans*. In that case the defendant was the known and accredited agent of the principal, and had paid all the money over to him. Lord Mansfield, in his desire to procure the recognition by the common law of commercial practices which were common in his day, allowed to the Courts in this type of case a wider jurisdiction than his successors have been prepared to exercise.

T. E. C. B.

POSSESSION—INTERFERENCE WITH SALVORS—TREASURE TROVE—CORPUS OF POSSESSION—TRESPASS.

The Tubantia, 40 T. L. R. 335.

THIS action for trespass on the high seas was brought by Major S. V. Sippe, D.S.O., and certain French shipowners, against the British Semper Paratus Salvage Co. It appeared that in the spring of 1922 the plaintiffs had located the wreck of the Dutch steamship *Tubantia*. (The *Tubantia* had been torpedoed and sunk by the Germans in 1916. The sinking was an inexplicable blunder on Germany's part, as the vessel is believed to have contained two million twenty-mark gold pieces.) During the winter months the plaintiffs had suspended work, but had resumed it in the spring of 1923, and by July had established various appliances, including buoyed moorings, by which they had direct access to the deck at various points, so that, when weather and tide permitted, their divers could work among the cargo. They had cut a hole in the ship's side, and had raised some of the cargo to the surface. Their plant was liable at any time to be swept away by unusually bad weather. In these circumstances, the British salvage vessel *Semper Paratus*, belonging to the defendants, had come upon the scene, and some of its crew had dredged with loaded line and grapnels about the plaintiffs' moorings, thus endangering the lives of the plaintiffs' divers and interfering with their work.

Held, by the Right Hon. Sir H. Duke (President), that the case came within Admiralty jurisdiction, being a suit in respect to injurious acts done on the high seas (Blackstone, III. 7, s. 3; Comyns' Digest); that the plaintiffs were in possession of the *Tubantia* in July, 1923; and that the acts of the defendants constituted a trespass and molestation on the plaintiffs' rights. Therefore he ruled that the plaintiffs were entitled to an injunction restraining the defendants from further interference with the *Tubantia's* wreck or cargo, and that the plaintiffs might have, if they so desired, a reference to assess the damage, if any, sustained by them.

The first question raised was whether the *res derelicta* was treasure trove, and therefore belonged to the King. This did not have to be decided; for if the plaintiffs had possession for the time being, that possession was good against all but the rightful owner (*Armory* v. *Delamirie*, 1 Sm. L. C. 356; *Bridges* v. *Hawkesworth*, 15 Jur. 1079; *The Winkfield* [1902] P. 42), and the defendants had no claim of rightful ownership.

The next and essential point was as to whether or not the plaintiffs had actual possession. As the possession of salvors has always been recognized in the Courts (as, for example, in *Crossman* v. *West*, 13 App. Cas. 160, and in *The Blenden-Hall*, 1 Dod. 414), the plaintiffs were entitled to a decision on the question. That they had the *animus* of possession was clear. That they had *corpus* as well was true for the following reasons: First, their conduct was such as to indicate proper possession. They dealt with the wreck as a whole and in a prudent fashion, considering the fact that they wished to inform themselves as to the stowing of the cargo before using a more powerful apparatus. Secondly, they were in effective control of the wreck as a whole, with power to exclude all strangers, except those who used unlawful force. Thirdly, while thus in control, no stranger could have exercised control

or performed any useful work. These facts constituted possession in the accepted sense of the word laid down in *Lord Advocate* v. *Young*, 12 App. Cas. 544: "by possession is meant possession of that character of which the thing is capable." The case in hand may be compared as to this point with *Hogarth* v. *Jackson*, Moo. & Mal. 58, in which it was held that there was possession of a whale when that possession consisted merely in having the whale so entangled in the rope that there was "reasonable hope of securing her."

Possession was now proved. Was there trespass? The defendants had thrust themselves in with intent to hamper the plaintiffs, and to deprive them of some or all of the advantages gained by either joining in the work and thus securing part possession, or by ousting them and thus securing entire possession. Such an interference in a lawful undertaking was clearly trespass as such, and might be compared with *Keeble* v. *Hickeringdale*, 11 East, 573, n., and *Carrington* v. *Taylor*, 11 East, 571. That salvors have a right to sustain an action for trespass is shown in two cases: In *The Blenden-Hall*, 1 Dod. 414, Lord Stowell says that "those who have obtained possession of a ship as salvors have a legal interest which cannot be divested before adjudication takes place in a Court possessed of competent authority." In *Crossman* v. *West*, 13 App. Cas. 160, it is held that "in the case of a derelict the salvors who first take possession have not only a maritime lien on the ship for salvage services, but they have entire and absolute possession and control of the vessel, and no one can interfere with them except in the case of manifest incompetence." Clearly the plaintiffs had shown no such incompetence in their work on the *Tubantia*. It was, indeed, held by the President that the defendants' molestation of the plaintiffs was of such a high-handed nature that it would have been actionable *per se*, even if the plaintiffs had just begun work on the wreck and had had no possession. This must, of course, be regarded as merely an *obiter dictum*.

J. P. H.

PROCEDURE—THIRD-PARTY PROCEDURE—INDEMNITY—WHERE IMPLIED BY LAW—CODE OF CIVIL PROCEDURE, 1907 (STRAITS SETTLEMENTS), S. 158.

Eastern Shipping Co. v. *Quah Beng Kee.* [1924] A. C. 177.
(Privy Council: On Appeal from the Supreme Court of the Straits Settlements (Settlement of Penang).)

THE P. & O. Shipping Co. were owners of a wharf in Sumatra. The Eastern Shipping Co. acquired, by contract, the right to berth ships in the wharf, all damage caused by the berthing of steamers to be made good by the Eastern Shipping Co.

Quah Beng Kee was a managing director of the Eastern Shipping Co., and was entitled (in virtue of his position) to berth at the wharf ships belonging to the plaintiffs. He gave orders for the berthing of the *Kamakata Maru*, a ship in which he was, and the Eastern Shipping Co. were not in any way, interested. Such instructions were wholly unauthorized, and were in breach of a duty to the Eastern Shipping Co. The Peninsular and Oriental Steamship Co. sued the Eastern Shipping Co. for the damage caused by this vessel, and the latter served

a third-party notice upon the respondent, claiming that he should indemnify them.

The Civil Procedure Code (1907) of the Straits Settlements enacts as follows:

Section 158, sub-section 1: "Where a defendant claims to be entitled to contribution or indemnity over against any person not a party to the action, he may by leave of the Court or a judge, issue a notice, hereinafter called a third party notice, to that effect."

Section 162, sub-section 1: "If a third party appears pursuant to the third party notice, the defendant giving the notice may apply to the Court or a judge for directions."

Sub-section 2: "The Court or judge upon the hearing of such application, may, if satisfied that there is a question proper to be tried as to the liability of the third party to make the contribution or indemnity claimed, in whole or in part, order the question of such liability, as between the third party and between the defendant giving notice, to be tried in such manner, at or after the trial, as the Court or judge directs."

The Appellate Court held that the appellants (Eastern Shipping Co.) were liable to the Peninsular and Oriental Shipping Co. in damages, and that, although the appellants had a right in damages against the respondent (Quah Beng Kee), the right did not support a claim to an indemnity so as to render the Civil Procedure Code applicable.

(The action against the respondent for damages was barred by the Statute of Limitations.)

On appeal to the Privy Council the question for discussion was whether, on the facts as stated, the appellants had, as against Quah Beng Kee, a right of indemnity. The Court decided:

(1) A right of indemnity arises generally from contract, express or implied, but it is not confined to cases of contract.

(2) A right to indemnity exists where the relation is such that either in law or in equity there is an obligation upon one party to indemnify the other.

(3) Such a right may also arise by statute.

(4) It may arise in cases in which the Court will "independent of contract raise upon his (the purchaser's) conscience an obligation to indemnify the vendor against the personal obligation of the vendor": *Waring* v. *Ward*, 7 Ves. 332, 336, a case of vendor and purchaser.

(5) The question of indemnity commonly arises in the case in which a trustee claims to be indemnified by his *cestui que trust*: *Hardoon* v. *Belilios* [1901] A. C. 118.

(6) Quah Beng Kee, though not a trustee in the full sense of the word, since no property vested in him, was trustee of his powers in the sense that they were vested in him in such manner that he stood in a fiduciary relation to the company in respect of those powers.

(7) The relations of the parties were such that the law implies the promise which it was Quah Beng Kee's duty to make, and from this arises a right of indemnity. Quah Beng Kee cannot be heard to say that, when he, as managing director, gave himself, as charterer of the ship, the user of the wharf, he did not require from himself, as the charterer, the same promise as that which it would have been his duty to require from a third party, namely, a promise that he would indemnify his principals against the consequences of his act.

It is worth while noting third-party procedure in English Courts of law.

The object of third-party rules is to prevent multiplicity of actions, and they are only intended to apply to clear cases of contribution and indemnity, where all questions between the parties can be finally decided in the action: *Baxter* v. *France* [1895] 1 Q. B. 455.

Third-party procedure is governed by Rules of Supreme Court, Order XVI. rule 48:

"Where a defendant claims to be entitled to contribution or an indemnity over against any person not a party to the action, he may by leave of the Court or a judge, issue a notice, hereinafter called the third party notice, to that effect. . . . The notice shall state the nature and grounds of the claim and shall unless otherwise ordered by the Court or a judge, be served within the time limited for delivering his defence."

In order to bring a case within Order XVI. rule 48, it is not enough to show that, if the plaintiff succeeds, the defendant will have a claim for damages against the third party; but the defendant must have against the third party a direct right to indemnity, which right must generally, if not always, arise from contract, express and implied: *Birmingham and District Land Co.* v. *London and North Western Railway Co.*, 34 Ch. D. 261.

H. M. A.

Real Property—Restrictive Covenant—Benefit not Running with the Land — Assignment of Adjoining Land by Covenantee — Enforceability against Assign of Covenantor.

Chambers v. *Randall.* [1923] 1 Ch. 149.

By a deed dated 1884 John Bullbrook conveyed certain land in Cambridge Terrace, Chatham, to H. Wood in fee-simple, subject to restrictive covenants, by which Wood, for himself and his assigns, covenanted not to use the land in certain ways, or do anything ". . . which may be or become a nuisance to the tenants, or prejudicial to the value of the houses belonging to the said John Bullbrook in Cambridge Terrace adjacent to the said premises. . . ."

In 1889 Bullbrook conveyed his interest in the houses nearest the said premises to the plaintiffs upon certain trusts, and before his death in 1898 parted with all his other houses in Cambridge Terrace. By his will he appointed the plaintiffs his executors, who duly proved the will.

In 1903 Wood died, having devised by his will the property in Cambridge Terrace to one Roberts, by whom it was conveyed in 1914 to the defendants, with notice of the covenant in the deed of 1884.

In 1922 the defendants began to erect four lock-up motor garages, and thereupon this action was brought on the covenant in the deed of 1884.

It was urged for the plaintiffs (1) that the covenant was assignable, and that therefore they could sue on it; and (2) that even if it was not assignable they could sue on it as Bullbrook's executors, as they filled this office, as well as being trustees of the property.

Held, that both these arguments were invalid for the following reasons.

The case differs from *Rogers* v. *Hosegood* [1900] 2 Ch. 388, in that there a covenant was inserted in a conveyance with the intent that it

might, "so far as possible, bind the premises thereby conveyed, and every part thereof, into whosesoever hands the same might come, and might enure to the benefit of the mortgagees, their heirs and assigns, and others claiming under them to all or any of their lands adjoining or near the premises."

There the benefit of the covenant was held to run with the land, according to the expressed intention of the parties; but in the present case there is nothing to show that the benefit of the covenant was intended to run with the land. The question depends on the construction of the covenant, and in this case it said that it was made to prevent anything being done "which was a nuisance to the tenants, or prejudicial to the value of the houses belonging to the said Bullbrook in Cambridge Terrace adjacent to the said premises."

The natural construction of this covenant is that Bullbrook was not intending to annex the benefit of the covenant to those definite houses, so that it would pass to any purchaser from him of any one of the houses, but was obtaining a covenant which would be of use to him for the protection of his houses in his own hands and for enabling him to dispose of them advantageously to anyone with whom he might deal in the future.

Bullbrook then made the covenant solely for his own advantage, as in *Master* v. *Hansard*, 4 Ch. D. 718, where Bramwell, L.J., decided that a restrictive covenant ". . . was not put in for the benefit of the particular property, but for the benefit of the lessors, to enable them to make the most of the property which they retained."

In the present case, then, the covenant did not run with the land, and the plaintiffs could not sue on it as trustees of the property benefited by it.

With regard to the second point raised by the plaintiffs that they could sue as Bullbrook's executors, the cases of *Ives* v. *Brown* [1919] 2 Ch. 314, and *Lord Northbourne* v. *Johnston & Son* [1922] 2 Ch. 309, must be distinguished from the present case in that, in both those cases, the covenants were entered into for the purpose of the subsequent beneficial development of large estates which had not then been developed, and for the development of which it was necessary to make use of the covenants.

Formby v. *Barker* [1903] 2 Ch. 539, and *London County Council* v. *Allen* [1914] 3 K. B. 642, are in point, and differ from the present case only in that, in both those cases, at the dates of the covenants, the covenantees retained no property to be aided by the enforcement of the covenants. In *Formby* v. *Barker* the vendors sold all their land without retaining any; and in *London County Council* v. *Allen* the council never had any land, and were not selling any, but were in the position of persons taking a merely personal covenant; whereas, in the present case, it was only subsequent to the making of the covenant that Bullbrook disposed of his land.

In *London County Council* v. *Allen* the London County Council had given leave, under the London Building Act, 1894, s. 7, for an owner of land to lay out a new street on his land on condition that he entered into a covenant not to build on the plot of ground at the end of the proposed street so as to afford facilities for the continuation of the proposed street at a later time if desired. The owner then entered into a covenant for himself, his heirs and assigns, and, so far as practicable,

to bind the land into whosesoever hands it should come, that he and they would not build on the plot of ground.

Held, by the Court of Appeal, that the London County Council could not enforce the covenant against an assignee of the covenantor who had notice of the covenant.

Scrutton, J., said the plaintiff never had any land for which this "equitable interest analogous to a negative easement" could be created; and "if the covenant does not run with the land in law, its benefit can only be asserted against an assign of the land burdened, if the covenant was made for the benefit of certain land, all or some of which remains in the possession of the covenantee or his assign, suing to enforce the covenant."

If the principles in *Formby* v. *Barker* and *London County Council* v. *Allen* be applied, the effect of the reasoning in these two cases is that the equitable doctrine enabling restrictive covenants to be enforced against assigns with notice ought only to be applied where it is sought to enforce the covenant in connection with the enjoyment of the land that it was intended to protect.

The principle in *Formby* v. *Barker*, even if Bullbrook could have sued before his death, would prevent his executors from suing, seeing that before his death he had disposed of the land benefiting by the covenant.

The later case of *London County Council* v. *Allen* lays it down that the covenantee himself, after he has disposed of his land, cannot sue on such an assignment. If this principle is applied, Bullbrook himself could not have sued the defendants after he had disposed of all his interest in Cambridge Terrace. *A fortiori* his executors cannot subsequently sue on the covenant.

Held, therefore, that the plaintiffs had no right to sue on the covenant at all.

C. W. D. C.

Real Property—Right of Way Lost by Abandonment—The Nature of Abandonment.

Swan v. *Sinclair*. [1923] W. N. 299.

In this case the Court of Appeal had to decide what constitutes an abandonment of a right of way.

It is, as Lord Chelmsford said in *Crossley & Sons* v. *Lightowler*, L. R. 2 Ch. App. 478, "a question of fact whether the acts of the parties were of so unequivocal a nature as clearly to denote an intention to abandon the right."

In the present case, a block of houses, with gardens behind them, were sold in 1873 in separate lots, with covenants that a fifteen-feet strip at the bottom of each of the gardens (which were separated from one another by fences) should be formed into a road as soon as possible at the expense of the purchasers, and that the several lots were subject to, and entitled to the benefit from, the intended right of way.

Between 1873 and 1922 no effort had been made to make the road, and in 1883 the tenant of No. 1 had levelled up his garden, so that there was a six-feet drop between it and the garden of No. 2 at the place where the road should have been made.

In 1904 the plaintiff became tenant of No. 1 on a lease expiring in 1922.

In 1911 he became freeholder of Nos. 2 and 3; and in 1919, in contemplation of the end of his lease of No. 1, he levelled up the gardens of Nos. 2 and 3, so that they should be on the same plane as No. 1. He then knocked down the fences separating the gardens at the spot where the road should have been made, intending to make a garage on No. 2 and to have an exit for his car by means of the right of way across No. 1.

In 1922 the defendant became freeholder of No. 1, and promptly rebuilt the wall separating the gardens.

The plaintiff then brought an action, claiming the right of way as contemplated in 1873.

The Court below found for the defendant. The plaintiff thereupon appealed. The Court of Appeal, by a majority, dismissed the appeal, the Master of the Rolls dissenting. It was undisputed that non-user alone did not constitute sufficient evidence of an intention to abandon the right: *Reg.* v. *Chorley* (1848) 12 Q. B. 515.

Thus Baron Alderson said in *Ward* v. *Ward* (1852) 7 Exch. 839: "The presumption of abandonment cannot be made from the mere fact of non-user. There must be other circumstances in the case to raise that presumption. The right is acquired by adverse enjoyment. The non-user, therefore, must be in consequence of something adverse to the user."

And in the same case Lord Chelmsford said: "A long-continued suspension may render it necessary for the person claiming the right to show that some indication was given, during the period that he ceased to use the right, of his intention to preserve it."

In the present case, Warrington, L.J., said that the user of the road had been rendered impossible, not only by the continuance of the obstructions existing at the date of the grant, namely, the dividing fences, but also by the creation of a fresh obstruction in 1883, through the raising of the level of No. 1 at the place where the road should have passed. The acquiescence of the occupiers of the other houses, who had the benefit of the right, in (1) the continuance of the old obstructions, and (2) the raising of a new one, was a clear indication that they never intended to use the right, and therefore had abandoned it.

His decision is thus based on the statement of Baron Alderson, and not on that of Lord Chelmsford, which would have made it necessary for the plaintiff to show that he had given some indication of his intention to retain the right, which in this case he could not have done.

The Master of the Rolls pointed out, in his dissenting opinion, that the user was never exercised, as the road had never been made, and therefore there could be no cesser of use; and in view of this difference he thought clearer evidence was required to indicate an intention to abandon the right.

It is submitted that the distinction drawn by the Master of the Rolls between cesser of use and non-user is one which cannot be supported on principle.

In *Reg.* v. *Chorley* Lord Denman said: "We apprehend that, as an express release of the easement would destroy it at any time, so the cesser of use, coupled with any act clearly indicative of an intention to abandon the right, would have the same effect."

It could make no difference if we substitute "non-user" for "cesser

of use" here. The emphasis is on an act "indicative of an intention to abandon." That act is supplied in the present case by the acquiescence of the occupiers in the obstructions to the right of way, and particularly by their acquiescence in the new obstruction placed there in 1883.

These, it is true, are merely omissions, but such may be just as indicative of intention as a positive act.

F. K. G.

TORT—NEGLIGENCE—AGISTMENT—ANIMALS MANSUETAE AND FERAE NATURAE—OWNER'S LIABILITY.

Manton v. *Brocklebank.* [1923] 1 K. B. 406; [1923] 2 K. B. 212; 39 T. L. R. 112, 344.

THE plaintiff, Mrs. Sarah Manton, was accustomed to put out her horse for agistment in a field, the property of a Mr. Shillito. The defendant, having obtained Mr. Shillito's consent, let loose a mare into the same field. This mare had been purchased with a warranty that she was quiet, and no notice was given to Mrs. Manton. Subsequently the plaintiff's horse was found with a broken off foreleg, such damage (according to the finding of the County Court Judge) having been caused by the defendant's mare. Plaintiff claimed damages for the loss of the horse, which had to be destroyed.

The Divisional Court (Darling and Salter, JJ.) upheld the decision of the County Court Judge in favour of the plaintiff's claim. Darling, J., based his decision as follows:

(1) There are two types of beast: (*a*) Those *ferae naturae, e.g.*, tigers and lions which a man keeps at his peril; and (*b*) those *mansuetae naturae, e.g.*, oxen and horses; for these a man will be liable in an action if he has had notice of the quality of the beast: *Rex* v. *Huggins*, 2 Ld. Raym. 1574, 1583.

(2) A mare is likely to be skittish, and may do what the mare in this case in fact did. It is not necessary for the plaintiff to prove any more than that.

(3) It was really a negligent act for the defendant not to give notice to the plaintiff that he was going to put an animal into the field which was likely to injure the horse which was already there.

(4) This case illustrates the principle, *Ubi jus, ibi remedium.* Torts are infinitely various, not limited or confined, for there is nothing in nature but that may be an instrument of mischief: *Winsmore* v. *Greenbank* (1745) Willes, 577.

Salter, J.: This is an action of trespass. The liability is one incident to the right of ownership, and is based on the principle, *Sic utere tuo ut alienum non laedas.* It is a rule of law that, if an animal which is the subject of property, acting according to the nature of that animal as known to its owner, whether as a matter of common or of particular knowledge, injures the person or property of another, its owner is responsible.

It is a little difficult to understand on what particular ground the learned Judges in the Divisional Court really decided. They seem to

have based their decision in favour of the plaintiff on all the following grounds:

(*a*) Negligence;

(*b*) Trespass;

(*c*) It is natural for a mare to kick a horse; therefore the mare comes within the class of animals for which an owner is absolutely responsible—at any rate, as regards this particular vice possessed by mares.

The Court of Appeal reversed the decision of the Divisional Court.

The following is a brief summary of the law as regards the liability of owners for damages by their animals. Dogs are excluded from this summary, except in so far as they come under the heading of "Domestic and Harmless Animals." The Dogs Act (6 Edw. 7, c. 32) is not considered.

(1) There are two classes of animals—those *ferae naturae* and those *mansuetae naturae*. The latter are harmless and domestic animals. In the case of the former the owner keeps them at his peril. This is but an application of the principle in *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 330. For injuries done by the latter an owner is only liable if he knew of the existence of the trait in the particular animal: *Rex* v. *Huggins, supra.*

(2) If a horse does something which his owner has no reason to expect he will do, he has the same sort of protection that the owner of a dog has: *Cox* v. *Burbidge,* 13 C. B. (N.S.) 430.

(3) Once establish *trespass, quare clausum fregit,* on the part of an animal, and the owner is liable for all damage which is not too remote. The question may then arise whether the act is so alien to the animal's nature as to make the damage too remote. For one horse to bite another is not so alien: *Lee* v. *Riley,* 18 C. B. (N.S.) 722. This, however, is really a question, not of the existence or non-existence of a ground of action, but of the extent of damages. The liability arises in the tort of trespass: see also *Ellis* v. *Loftus Iron Co.,* L. R. 10 C. P. 10.

(4) The horse belongs to the class of animals which, according to the experience of mankind, is not dangerous, and not likely to do mischief; and if the class is dealt with by mankind on that footing a person may safely keep such animal, unless he knows that the particular animal he has is likely to do mischief: *Filburn* v. *People's Palace and Aquarium Co.* (1890) 25 Q. B. D. 258.

(5) *Manton* v. *Brocklebank.* An action for tort for damage by animals must be brought under one of the following heads: (*a*) Trespass; (*b*) negligence; (*c*) class of animals *ferae naturae*; and (*d*) knowledge of owner of animal belonging to class *mansuetae naturae* that it has dangerous characteristics. It may be that it is in the nature of an animal to do a particular act, and that this tendency is so universally acknowledged as inherent in this class of animals as to bring the animal out of the class *mansuetae naturae* into the class *ferae naturae,* as regards the owner's liability *for this particular vice.*

But the mere possession of an animal of the class usually described as *mansuetae naturae* does not render an owner liable for injuries done by it to persons or goods. There is no liability where a domesticated animal does damage of a kind not usual for such an animal to commit, unless it be proved that the defendant was aware of such a tendency. No more is established than that biting and kicking is a thing that may

or may not occur, and is not contrary to horse nature. This is not sufficient to throw upon owners of horses an absolute liability—as exists in the case of dangerous animals—exclusive of trespass, negligence, or *scientia*, for such acts.

Mention should be made of the argument advocated by one of the learned counsel that mere trespass to goods gives a right of action—*qui facit per equum facit per se*. Therefore an action lies in trespass if the animal concerned is a proper subject of ownership at common law.

This was held to be unsound, as otherwise the hen that flew into the bicycle (*Hadwell* v. *Righton* [1907] 2 K. B. 345), and the sheep that collided with the motor-car (*Heath's Garage, Lim.* v. *Hodges* [1917] 1 K. B. 206), would both have involved their owners in liability.

Moreover, the distinction between animals *mansuetae* and *ferae naturae* would be superfluous if an owner were liable for trespass to goods and persons committed by his animals. An action for trespass to goods must either be based on an act which is wilful or negligent: *Holmes* v. *Mather*, L. R. 10 Ex. 261.

H. M. A.

TORT — NEGLIGENCE — MOTOR-CAR — NEGLIGENT DRIVING BY FRIEND OF OWNER—RETENTION OF CONTROL BY OWNER—OWNER'S LIABILITY FOR INJURY CAUSED TO AN INVITEE IN CAR.

Pratt v. *Patrick and Others.* [1924] W. N. 12.

THE plaintiff sued under Lord Campbell's Act, on behalf of herself and her four infant children, for damages resulting from the death of her husband in the following circumstances. On May 17, 1923, the defendant Patrick was being driven in his motor-car by his friend, a man named Essex, they being accompanied by Pratt, the deceased husband of the plaintiff. Owing to the negligence of Essex, the car collided with a motor lorry belonging to the firm of Sessions & Co., who were also made defendants to the action, but who were dismissed therefrom, the Judge holding that there was no evidence of negligence against their driver. In the collision Pratt received injuries of so serious a nature that he died.

Acton, J., gave judgment for the plaintiff.

In this case two questions arose:

(1) What is the duty of care, if any, owing by the owner to a person who is invited to ride in a car gratuitously?

(2) What is the degree of responsibility of an owner of a car for a person whom he permits to drive it?

The first of these questions was answered by the case of *Harris* v. *Perry & Co.* [1903] 2 K. B. 219. This case decided that the duty owed by a person who undertook the carriage of another gratuitously was to exercise reasonable care. The learned Judge in that case cited Parke, B., in *Lygo* v. *Newbold* (1854) 9 Ex. 302: "A person who undertakes to provide for the conveyance of another, although he does so gratuitously, is bound to exercise due and reasonable care."

As regards the second question, the learned Judge referred to the case of *Samson* v. *Aitchison* [1912] A. C. 844. This was an appeal from the decision of the Supreme Court of New Zealand, reversing the decision

of the Judge in the Court of first instance, to the Judicial Committee of the Privy Council, which reaffirmed the decision of Williams, J., in the Court of first instance. In this case it was decided that, where the owner of a vehicle, being himself in possession and occupation of it, requests or allows another person to drive, this will not exclude his right and duty of control, and that, therefore, in the absence of further proof that he has abandoned that right by contract or otherwise, the owner is liable as principal for damage caused by the negligence of the person actually driving. Lord Atkinson, in giving judgment, quoted from the decision of the Judge of the Court of first instance: "I think that where the owner of an equipage, whether a carriage and horses, or a motor, is riding in it while it is being driven, and has thus not only the right to possession, but the actual possession of it, he necessarily retains the power and the right of controlling the manner in which it is to be driven, unless he has in some way contracted himself out of this right or is shown by conclusive evidence to have abandoned his right. If any injury happen to the equipage, while it is being driven, the owner is the sufferer. In order to protect his own property, he must be able to say to the driver, 'Do this or do that'; the driver would have to obey, and if he did not the owner in possession would compel him to give up the reins or steering wheel. The owner indeed has a duty to control the driver. If the driver is driving at a speed known to the owner to be dangerous, and the owner does not interfere to prevent him, the owner may become responsible criminally." The duty to control postulates the existence of the right to control. If there was no right to control, there could be no duty to control. No doubt, if the actual possession of the equipage has been given by an owner to a third person, that is to say, if there has been a bailment by the owner to a third person, the owner has given up his right to control.

An interesting case in point is *Wheatley* v. *Patrick* (1837) 2 M. & W. 650, where A borrowed of B a horse and chaise, and went in it accompanied by C on an excursion of pleasure, C driving. By C's mismanagement the horse and chaise were driven against and injured the plaintiff's horse. *Held*, that an action on the case might be maintained for the injury against A on a declaration charging that he was possessed of and driving the horse and chaise, and that by his negligent driving the injury was occasioned.

W. R. L.

TORT—NEGLIGENCE—UNGUARDED DOCK—ACCIDENT ON FOGGY EVENING—DUTY OF DOCK OWNERS.

Mersey Docks and Harbour Board v. *Procter.* [1923] A. C. 253.

Two floating docks, eighty yards apart, together with the square promontory separating them, belonged to the appellants. Parallel with the docks, and at a distance of fifty yards from the dock on the west of the promontory, ran a road, with two double rows of railway lines let into its stone surface.

Procter, a boilermaker, was engaged by contractors on board a ship lying in the eastern dock. One foggy evening, after dark, he left the ship to visit the latrine, which was approached along the above-mentioned road. Next day his body was found in the water, on the opposite side

of the promontory, opposite a place where one of the guard chains, which protected the square on its three exposed sides, had been removed for two or three days.

The deceased's wife sued for damages under the Fatal Accidents Act, 1846, but the case was not allowed to go to the jury by Branson, J., on the ground that there was not sufficient evidence to connect the man's death with the absence of the chain. The Court of Appeal reversed the decision, but an appeal brought by the Board before the House of Lords was allowed by a majority of three to two.

It is useless trying to prove negligence, unless the act complained of can also be shown clearly to have been the cause of the injury suffered. An instance of this is *Wakelyn* v. *L. & S. W. R.*, in which it was proved that the deceased, whose body was found on the railway line near an unguarded level crossing, had been killed by a train which did not give warning of its approach. Nevertheless, it was held by the House of Lords that there was no case to go to the jury, because no evidence was produced as to how the man came to be on the line. Mere surmise is not sufficient, for there may be other suggestions equally reasonable. So in the present case the suggestion that Procter, having lost his way and relying on the chains for his safety, had unknowingly walked through the gap to his death, was no more reasonable than to suppose that he actually made for the gap, which he must have seen during the daytime, in order to cross to one of the ferry boats to speak to someone there, and fell in.

The Court of Appeal was satisfied on this point; but the House of Lords held that, assuming there was negligence, there was no evidence to connect it with the accident, and therefore there was no case for the jury.

It now remains to determine the legal relations existing between the two parties at the time of the accident, and the amount of care consistent with such relations.

It may seem that the business element present entitled the respondent to a greater degree of consideration than may be expected by a bare licensee from the occupier of premises. *Indermaur* v. *Dames*, where the plaintiff, while at work in the defendant's house, fell through an unfenced opening and was held to have a good cause of action, illustrates the rule that, where the occupier invites or induces a person to go upon his land for some purpose in which both have an interest, he must make reasonable provisions for that person's safety. Moreover, in accordance with the words of Baron Cleesby in *Holmes* v. *North Eastern Railway Co.*, "As soon as you introduce the element of business, which has its exigencies and necessities, all idea of mere voluntariness vanishes," it was argued that the Board should provide for the safety of such workmen, both in their passing to and from their work and in all matters essential to a reasonable standard of comfort in carrying out their duties.

Admitting, however, that the respondent was an invitee on business, it is not correct to suppose that such invitation extends to "a free range over the whole estate," as is plainly shown by *Walker* v. *Midland Railway Co.* Here the guest in a hotel, having lost his way in the dark at night, wandered into a room not used by guests and fell down a lift. He was unable to recover damages. Equally unsuccessful was the plaintiff in *Hardcastle* v. *South Yorkshire Railway*, when, wandering from the highway, he fell into an unfenced reservoir situated on the same land. "The duty," said Lord Selborne in the first illustration, "must, I think,

be limited to those places, into which guests may reasonably be supposed to be likely to go, in the belief, reasonably entertained, that they are entitled or invited to do so." The plaintiff, on becoming a bare licensee, must accept the premises as he finds them.

On these lines it may be argued that Procter had no business to be wandering about fifty yards from the highway, for it was not denied that the road along which he should have gone was used as a public highway for pedestrian and vehicular traffic, and it was furnished with lamps at frequent intervals. This being so, although the Board, fully alive to the possible dangers, and with the experience of previous accidents, had issued strict instructions concerning the maintenance of the guard chains in their proper positions, they did not owe such a great duty of care to the deceased as they would have done if the danger had been by the side of the road. The words used in *Walker* v. *Midland Railway Co.* are no less applicable here: "This is not a question of any 'act' done by the respondents; it is one of alleged neglect or default. Wrongful neglect or default there could not be, unless a duty, which was not performed, was previously owing by the respondents towards the plaintiff's husband, or towards persons in the same situation, in respect of the place where the accident happened."

To support the notion of a "hidden trap" caused by the negligence of the appellants it was submitted that the deceased, knowing the square to be fenced as a matter of general precaution, might reasonably expect to find the same precautions taken in circumstances of extreme and exceptional peril, as, for instance, in foggy weather. In addition, the rule in *Gallagher* v. *Humphrey*—that, even in the case of a bare licensee, superadded negligence of the licensor is a good cause of action—might have been more effective, but that it seemed obvious that the deceased had himself been wanting in due care for his own safety. A man of the neighbourhood, he was, no doubt, accustomed to seeing such docks wholly unguarded by chains, and, being reasonably observant, would have noticed the gap which had been open for a few days while workmen were engaged on the spot. Having once strayed from the hard track, with its row of lamps, on to the ground that was soft under foot, he must have been alive to the danger of his position, and should have taken reasonable means accordingly, either by calling for help or by stepping warily, in which case the obstructions round the gap would have warned him that he had reached the line of the chains, which were twelve feet from the water's edge. On this point Lord Carson agreed with Lord Sumner, who said: "My conclusion is that there was no trap, because in the deceased's place a reasonable man would have known that, such as it was, the danger was one to be reckoned with," and that therefore the cause was not proved.

The three grounds on which the appeal rested were that there was no evidence to connect the plaintiff's death with the circumstances alleged, and therefore no case for a jury; secondly, that, as bare licensee, the deceased was entitled to no positive duty on the part of the appellant board; and, in addition, there was the plea of contributory negligence. The appeal was accordingly allowed.

W. P. D.

TORT—NUISANCE—ABSOLUTE LIABILITY—VIBRATIONS DUE TO BUILDING OPERATIONS.

Hoare & Co. v. *McAlpine.* [1923] 1 Ch. 167.

IN preparing a site for a building in the heart of the city the defendants drove a very large number of piles into the soil, hereby setting up such a heavy vibration as to cause serious structural damage to an old house belonging to the plaintiff, with the result that the greater part had to be taken down in compliance with a dangerous structure notice. Plaintiffs sued for damages.

Submited, that the principle of *Rylands* v. *Fletcher* (1868) L. R. 3 H. L. 338-340, as explained in *National Telephone Co.* v. *Baker* [1893] 2 Ch. 186, 199, and *Att.-Gen.* v. *Cory Bros.* [1921] 1 A. C. 521, 539, applied, so that, even if, as the defendants alleged, the plaintiffs' house was in an abnormally unstable condition, the defendants were responsible as insurers for all the damage caused by the escape of the vibration they had so created.

Held, however, on the actual facts, that the plaintiffs' house, though very old, was not in such an abnormally unstable condition as to prevent the vibration being treated as an ordinarily actionable nuisance.

The law as to nuisance is well expressed by Knight Bruce, V.-C., in *Walker* v. *Selfe* (1851) 4 De G. & Sm. 322: "Ought this inconvenience to be considered in fact as more than fanciful, more than one of mere delicacy or fastidiousness, as an inconvenience materially interfering with the ordinary comfort physically of human existence, not merely according to elegant or dainty modes and habits of living, but according to plain and sober and simple notions among English people?"

The standard of comfortable living which is thus to be taken as a test of nuisance is not a simple universal standard for all times and places, but a variable standard, differing in different localities.

On the other hand, no action will lie for nuisance which, even though substantial, is due solely to the fact that the plaintiff is abnormally sensitive to deleterious influences, or uses his land for such purpose as requires exceptional freedom from any such influences.

So, if I carry on a manufacture or other business which is so sensitive to adverse influences that it suffers damage from smoke, fumes, vibration, or heat, which would in no way interfere with ordinary occupations of land, the law of nuisance will not confer upon me any special and extraordinary protection. I must acquire immunity of this sort by special contract with my neighbours. Thus, in *Eastern and South Africa Telegraph Co.* v. *Cape Town Tramways,* an action was brought by the telegraph company for interference with its telegraphic operations through induced currents caused by the working of the defendants' electric cars. The Privy Council held the defendants not liable on the ground that such a cause would do no harm to the ordinary occupation of land, and that the damage done was due solely to the exceptionally delicate nature of the operations carried on by the plaintiffs.

"A man cannot increase the liabilities of his neighbour by applying his own property to special uses, whether for business or pleasure."

The same principle was acted on by the Court of Appeal in *Robinson* v. *Kilvert* (1889) 41 Ch. D. 88, where the nuisance complained of was of heat causing damage to the exceptionally delicate manufacture of the plaintiff.

Two other cases as to the law of nuisance are in point—*Grosvenor Hotel Co.* v. *Hamilton* (case of landlord and tenant) and *Kine* v. *Jolly*.

In *Grosvenor Hotel Co.* v. *Hamilton* Lindley, L.J., said: "The first question is whether the tenant has any right of action. It has been contended that the tenant's house was weak and insecure, and that the tenant is seeking to impose on his landlord a duty more extensive than that of the ordinary neighbour; for to make vibration caused by a neighbour actionable it must be such as would damage a house of reasonable strength."

Moreover, in *Kine* v. *Jolly*, Cozens-Hardy, L.J., laid down that "we must bear in mind that in these cases, which are conveniently grouped together as cases in which the proper form of action is an action for nuisance, citizens are not to be allowed to enforce rights which limit the use by others of property unless the facts relied upon as constituting a nuisance are such as interfere with the ordinary rights which, according to the notions of mankind, they are entitled to exercise in relation to one another, and in relation to their property."

There is an interesting difference between the law applicable to an ordinary nuisance and to the rule in *Rylands* v. *Fletcher*. The rule in *Rylands* v. *Fletcher* may be formulated thus: The occupier of land who brings or keeps upon it anything likely to do damage if it escapes is bound at his peril to prevent its escape, and is liable for all the natural consequences of its escape, even if he has been guilty of no negligence.

In *National Telephone Co.* v. *Baker* Kekewich, J., held that a man who creates an electric current for his own purpose, and discharges it into the earth beyond his control, is, on the principle of *Rylands* v. *Fletcher*, as responsible for the damage so caused as he would have been if instead he had discharged a stream of water.

Att.-Gen. v. *Cory Bros.* is interesting on account of Lord Finlay's remarks as to insurance. In this case an action was brought by the Attorney-General on the relation of an urban district council. The plaintiffs claimed (*inter alia*) an injunction against a colliery company in respect of damage done and threatened by a landslide to a road vested in the council. The colliery company had tipped a vast mass of colliery spoil on the side of a hill, where the landside occurred, under a licence from the owners of the land on which the tips were made.

The plaintiffs alleged that the landslide was caused by the action of the company in depositing their spoil on the hillside without taking reasonable precautions to secure its stability.

In a second action brought by the landowners, who had granted the licence to tip, the plaintiffs claimed an injunction and damages against the company in respect of damage done by the landslide to houses belonging to the plaintiffs on the ground that the company had tipped to an unreasonable extent and in an unreasonable manner.

Held, on the evidence, that the company were liable in the first action on the grounds of negligence and on the principle of *Rylands* v. *Fletcher*, and in the second on the ground of negligence.

As to the applicability of *Rylands* v. *Fletcher*, Viscount Finlay says on p. 538: "It is obviously immaterial for this purpose whether damage be caused by the colliery material itself directly or by its pushing other material in front of it downhill upon the house or other property injured. There was every reason to apprehend at the date of the writ in the Attorney-General's action that damage might be caused by the escape of the colliery spoil in

either or both of these ways. So far as the Attorney-General's action is concerned, it would be unnecessary to consider the question of whether it was by negligence of Cory Bros. in the deposit of the colliery refuse in too great quantities or by their failure to take proper precautions that the ill consequences ensued. I think Sargant, J., was right in thinking that the doctrine of *Fletcher* v. *Rylands* would apply to the case and would render Cory Bros. liable for the consequences of their depositing such dangerous material, whether there was negligence on their part or not."

W. R. L.

TORT—CONTRIBUTORY NEGLIGENCE.

Brandon and Wife v. *Osborne Garrett & Co., Lim., and Another.*
The Times, January 16, 1924.

MR. and Mrs. Brandon were visiting the hairdressing establishment of Osborne Garrett & Co., which premises were undergoing repair. The repairers were working on the roof, and had negligently omitted to cover up the exposed glass of a skylight. Under this, in the room below, stood Mr. Brandon, while Mrs. Brandon stood a little to one side of him. One of the repairers dropped a piece of timber through the skylight, which descended into the room. Mrs. Brandon saw her husband's danger, and started forward to pull him out of the way of the falling glass and timber. Mr. Brandon was injured by the glass, and Mrs. Brandon injured herself in making so sudden a movement.

To the above we must add one more factor. Mrs. Brandon had years previously suffered from leg trouble, diagnosed as thrombosis, which was again revived by the accident. Both husband and wife sued Osborne Garrett & Co. and the repairer's employer.

Mr. Brandon's claim is clearly well recognized in law. Damage had resulted from the negligence of the repairers, and Osborne Garrett & Co., Lim., were responsible for the negligence of their servants and agents.

But Mrs. Brandon's claim was without previous recognition in English law. Counsel for the defendants argued that:

(1) No danger had threatened her.
(2) She was not trying to escape any danger to herself when she suffered the injury.
(3) Her injury was caused by her own voluntary act.

The first of these propositions is doubtful on the evidence. But it may be neglected. Swift, J., lays down an important limitation to the principle on which the latter two arguments are based—the principle of *volenti non fit injuria.*

The ordinary rule is that a plaintiff cannot recover if there was contributory negligence on his part. But negligence has a special meaning, and the plaintiff in the present case was not guilty of contributory negligence if she did *no act which* a reasonable person ought not to do under the circumstances. Here, considering the nature of the accident, it was proper and reasonable for her to try to save her husband, even at some risk to herself, and there was, therefore, no contributory negligence on her part.

Only in a few Scottish and American cases has such reasoning been applied before. In an American case (*Eckhert* v. *Long Island Railway Co.*, 43 New York, 502) an action was successfully brought by the representative of a man killed in getting a child off the railway track in front of a train which was being negligently driven.

In discussing this question Sir Frederick Pollock says (*Law of Torts* (12th ed.), p. 486): "It is also held that the running of even an obvious and great risk in order to save human life may be justified, as against those by whose default that life is put in peril. And this seems just, for a contrary doctrine would have the effect of making it safer for the wrongdoer to create a great risk than a small one. Or we may put it thus: that the law does not think so meanly of mankind as to hold it otherwise than a natural and probable consequence of a helpless person being put in danger that some able-bodied person should expose himself to the same danger to effect a rescue."

C. A. B.

TORT—COMBINATION—ABSENCE OF INTENT TO INJURE—WANT OF JUSTIFICATION.

Sorrell v. *Smith and Others.* [1923] 2 Ch. 32. Reversed, C. A. [1924] W. N. 107.

THIS case raised again the difficult question of the legality of a combination to interfere with the rights of an individual to trade as he wills. The Court of Appeal differed from the Judge of first instance in its interpretation of the apparently conflicting decisions in *Allen* v. *Flood* [1898] A. C. 1, *Mogul Steamship Co.* v. *MacGregor, Gow & Co.* [1892] A. C. 25, and *Quinn* v. *Leathem* [1901] A. C. 495.

The plaintiff was a retail newsagent and a member of the retailers' federation, which advocated a district limit policy, which had as its object the prevention of newcomers from opening shops for retail trade in any area already sufficiently supplied. Messrs. R., wholesale newsagents, from whom the plaintiff had received his supplies of newspapers, supplied these newcomers also, whereupon the plaintiff transferred his custom to Messrs. W. Messrs. R. thereupon complained to the defendants, a committee of the circulation managers of certain newspapers, who took the matter up, and requested Messrs. W. to cease to supply the plaintiff or otherwise their own supplies would be stopped. Messrs. W. complied with this request, and thereupon the plaintiff sued for an injunction to restrain defendants from interfering with his right to enter into contractual relations with Messrs. W.

Russell, J., found, on the evidence, that the defendants were not actuated by any spite against the plaintiff, nor did the defendants combine to produce any breach of contract. He found that the defendants combined to bring it about by threats that Messrs. W. should refuse to deal with the plaintiff; that no sufficient justification existed for their action; and consequently he granted the injunction. This judgment was reversed by the Court of Appeal, who preferred to follow their previous opinion in *Ware and De Freville* v. *Motor Trade Association* [1921] 3 K. B. 40, as to the actual grounds of the decision in *Quinn* v. *Leathem*, an opinion

with which Russell, J., disagreed, although he thought that the judgment in that case was right in any view of the law.

What were the actual grounds for the decision in *Quinn* v. *Leathem*? Was the judgment of the House of Lords based on the existence in the combination of an intent to injure, of an intent by Quinn to injure Leathem irrespective of any advantage or loss that might accrue to the trade union thereby; or was it based on the ground that any combination to interfere with a person in carrying on his business is actionable as a violation of a man's right to trade as he wills, unless the acts done can be justified as an exercise of a similar right by the persons who do it?

The former view—the view that the existence of an intent to injure the plaintiff was the test of liability—received judicial approval in *Ware's Case*, where Bankes and Atkin, L.JJ., made it quite clear that they thought the effect of *Quinn* v. *Leathem* was to decide that a lawful act done by one does not become unlawful if done with an intent to injure another, whereas an otherwise lawful act done by two or more in combination does become unlawful if done by the two or more in combination with intent to injure another. Scrutton, L.J., also agreed that this was the effect of *Quinn* v. *Leathem*; and although he disagreed with its soundness, he nevertheless felt himself bound by it.

If this is correct, then in the present case Russell, J., must have found for the defendants, but he refused to accept the view of the Court of Appeal in the *Ware Case* as to the grounds for the decision of *Quinn* v. *Leathem*. In his judgment, the decision in that case was not based on the existence of an intent to injure. It was based on the ground that, quite apart from intent or motive, any interference with contractual relations, if committed knowingly, gives a cause of action, unless sufficient justification exists. In support of this view he quoted various passages from the decisions of the Lords who took part in that case. Among others, Lord Brampton (at p. 525) said: ". . . the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader, in carrying on his business, and by so doing to invade his undoubted right to carry it on according to his own discretion and choice."

Quinn v. *Leathem*, however, seems to have been decided just as much on the grounds of combination plus malice, and it is possible to pick out many passages in the judgments there delivered in which the existence in the combination of an intent to injure is given a prominence which it is impossible to subordinate into the position of mere *dicta*. For instance, Lord Shand (at p. 512): "While combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object but in pursuit merely of a malicious purpose to injure another would be clearly unlawful"; and at p. 515: "here the defendants acted for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal."

The Court of Appeal, in reversing Russell, J., have reaffirmed this view of the case, and of their own decision in *Ware's Case*. Russell, J.'s decision was based upon too narrow a ground. He had decided that in this particular case no investigation of the merits of the dispute had been made by the defendants, and that the only justification for their action was the desire to have control over the application of the distance limit policy. This is not the true point of view from which to look at

the matter. The defendants represented a body of traders, and it cannot be disputed that they were entitled to adopt a policy in order to protect their trade, even if it interfered with the business of others. The action was legitimate, and was taken for the purpose of defending what was, in their opinion, the policy which it was necessary for them to maintain in order to sell their papers.

This case, so it appears, is to go to the House of Lords, where ultimately a clear exposition of the law as to these trade dispute cases may be obtained—an exposition which, though it may not reconcile all the decisions, will render less difficult the solution of such questions in the future.

J. B.

TORT—DAMNUM SINE INJURIA—CONSPIRACY.

Reynolds v. *Shipping Federation, Lim.* [1924] 1 Ch. 28.

THE defendants, a federation of shipowners, agreed with the National Union that they would employ only members of the National Union, who, on seeking employment, had to produce a card indicating their membership. The plaintiff belonged to another union, and failed to obtain employment because he had not the necessary card and refused to obtain one, though he could have procured a card by joining the former union. The object of the agreement was to secure a supply of men bound by the decisions of the National Maritime Board, the purpose being to remove any possibility of friction and ensure harmonious relations in the shipping trade between employers and employees. The plaintiff brought the action, alleging that the conduct of the defendant constituted a wrongful conspiracy to prevent him obtaining employment in any ship under the control of the Shipping Federation, and claimed a declaration that he was entitled to employment as a merchant seaman without being a member of the National Union.

Held, that, as the agreement was not prompted by a malicious desire to harm any individual or class, but was made from a desire to advance the business interests of employers and employed, it was not unlawful, and no action for conspiracy was maintainable.

This case illustrates the proposition that a man may suffer actual damage without necessarily having a legal remedy. It is chiefly as an illustration of the application of the principle laid down in *Mogul Steamship Co.* v. *McGregor, Gow & Co.* [1892] A. C. 25, that it deserves a note.

The general theory is that all wrongs are remediable.

If a man suffers harm he has a remedy, unless the action can be justified: *Pollock on Torts* (12th ed.). It is, however, a sufficient justification for a harmful act arising out of an otherwise lawful agreement if the object of the agreement be the protection or advancement of one's own interest, and not primarily the infliction of loss on others.

What is sometimes not appreciated is that a combination *per se* is not unlawful. Persons may combine to do any lawful act. It is only when they conspire maliciously or employ unlawful means to effectuate a lawful object that the conspiracy becomes actionable.

A combination is wrongful if its object is to injure another individual or class of individuals, and if harm ensues is actionable: *Quinn* v. *Leathem* [1901] A. C. 495; see Atkin, L.J., in *Ware* v. *De Freville and the Motor Trade Association* [1921] 3 K. B. at p. 90.

The learned Judge (Sargant, J.) distinguished *Temperton* v. *Russell* [1893] 1 Q. B. 715, and *Quinn* v. *Leathem* (*supra*), in which cases there was a malicious desire to inflict an injury.

In the result the principle in the *Mogul Case* was applied, and the plaintiff failed in his action.

A. E. R.

Workmen's Compensation—Accident Arising Out of Employment.

Upton v. *Great Central Railway Co.* [1923] 2 K. B. 870; [1924] W. N. 21.

A labourer who was employed by a railway company was about to return to his home by train, and in his hurry to get into the train he slipped and injured his knee. Blood poisoning set in and he died. The platform was wet, but there was no evidence that it was slippery. It was admitted that the workman was still in the course of his employment when the accident happened. His widow claimed compensation.

The Court of Appeal held that death was not due to an injury by accident arising out of the employment within the meaning of the Workmen's Compensation Act, 1906.

The House of Lords allowed the appeal on the ground that "the accident plainly arose out of the conditions of the employment." The negligence of the workman himself was not material, as it was not "attributable to serious and wilful misconduct on his part." "The right given by the statute is no remedy for negligence on the part of the employer, but is rather in the nature of an insurance of the workman against certain sorts of accident." Upton might have escaped accident had he been more careful, but no such negligence as may have occurred was in law sufficient to take his case outside the statute.

In *Thom* v. *Sinclair* [1917] A. C. 127, a woman employed by a fish-curer, while working in a shed belonging to her employer, was injured by the fall of a wall which was being built on the property of an adjoining proprietor, with the result that the roof of the shed collapsed and the woman was buried under the wreckage. *Held*, accident arose out of her employment within the meaning of the Workmen's Compensation Act, 1906.

In *Stewart* v. *Longhurst* [1917] A. C. 257, a carpenter who was employed in repairing a barge lying in dock, after finishing his day's work, started on a dark night to walk along the quay to the dock gates, but fell off the quay and was drowned. The dock was private property and was not open to the public, but the man's employers and their workmen had leave to pass through the dock on their way to and from the barge. *Held*, that, inasmuch as the man was on the dock premises solely by virtue of his contract of service, the accident arose out of and in the course of the employment.

In *Dennis* v. *White* [1917] A. C. 479, a boy in the employment of a

firm of builders was ordered to go through the streets of London on a bicycle to fetch plaster. He collided with a car and was injured. *Held*, that the accident arose out of the employment, and that it is immaterial that the risk which caused the accident is one which is shared by all members of the public using the streets under like conditions.

In *Davidson* v. *M'Robb* [1918] A. C. 304, a seaman ashore by leave for his own purposes, on returning to the ship, fell from the quay and was drowned. The dock was under the control of the Admiralty, and closed to the public. *Held*, that the control of the Admiralty did not make the quay the provided access to the ship, and that the accident was not shown to have arisen out of the employment.

This case was distinguished from *Stewart* v. *Longhurst* (*supra*).

Semble, "in the course of the employment" does not mean during the currency of the engagement, but means in the course of the work which the workman is employed to do and what is incident to it; and absence on leave for the workman's own purposes is an interruption of the employment.

E. G. R.

ARBITRATION—AWARD—ERROR IN LAW ON THE FACE OF THE AWARD.

Champsey, Bhara & Co. v. *Jivraj Balloo Spinning and Weaving Co.* [1923] A. C. 480.

THE appellants had entered into contracts to sell certain bales of cotton to the respondent company, subject to the rules and regulations of the Bombay Cotton Trade Association.

Rule 12 of the association provided for arbitration in disputes as to the quality of the goods for sale. Rule 13 made similar provision for disputes other than those as to quality. All awards thus made were to be binding on the parties, subject to an appeal to the board within fifteen days.

In the present case, the buyers objected that the quality of the cotton was not up to contract. The arbitrators appointed under rule 12 gave their decision that this was so and awarded an allowance. But the buyers rejected the cotton. Thereupon the sellers claimed damages, and, on this second dispute being submitted to arbitration in accordance with rule 13, damages were awarded.

This award was confirmed by the appeal committee of the association. A petition to the Court that the award should be set aside was dismissed, but the Appellate Division of the High Court reversed the decision.

The grounds on which the appeal was made were (1) that there was no question referable to arbitration under rule 13, and (2) that there was an error of law on the face of the award.

It is established law that the arbitrator in such cases is to be final judge of all questions of law and of fact, with two exceptions—(i) where the award is the result of corruption or fraud, and (ii) where there is an error in law on the face of the award.

As to the second of these two exceptions, "an error in law on the face of the award means that one can find in the award or in a document actually incorporated, as, for instance, a note appended by the arbitrator

stating reasons for his judgment, some legal proposition which is the basis of the award."

The award in the case in question merely stated that the goods had been rejected by the respondents "on the grounds contained in their letters dated November 25, 1918, and November 11, 1918, respectively." The Court of Appeal considered that this entitled them to demand the letters mentioned, and on reading them they came to the conclusion that the arbitrators could not have arrived at their decision without entirely misinterpreting rule 52 of the association. The Court would never have come to this conclusion without looking behind the award itself, and it was to this investigation that the Judicial Committee objected. Their Lordships held that the mere reference to the letters did not entitle the Court to go further than the actual words contained in the award in order to investigate the legal proposition on which the award was based.

The respondents then urged the plea first mentioned—that the matter did not come within the jurisdiction of the arbitrator in accordance with rule 13, but that the contract came to an end immediately on the decision given as to quality. Their Lordships, however, held that the question clearly came within the jurisdiction of the arbitrators, because it was undoubtedly a dispute "arising out of or in relation to a contract made subject to the rules and regulations of the Cotton Trade Association"; and by rule 13 the whole question, whether depending on law or fact, was to be referred to the arbitrators.

The award was, therefore, allowed to stand, and the decision of the trial Judge, who had dismissed the petition, was restored.

W. P. D.

BOOK REVIEWS.

The Justice's Note-Book. By the late W. Knox Wigram, J.P. Tenth edition. London: Stevens & Sons, Lim. 1923. xii and 503 pp. (12*s.* 6*d.*; for cash 10*s.*)

"Good wine needs no bush" to advertise it. And a law book which has reached its tenth edition needs no reviewer's commendation to convince the public of its solid value. More than forty years have elapsed since the great extension of the summary jurisdiction over indictable offences by the Act of 1879, gave the late Mr. Knox Wigram cause to write the original edition of the volume now under review. Since then it has benefited by the labour of half-a-dozen able editors in succession—Messrs. Shirley, Bodkin, Warburton, Kershaw, Atkinson, and (in this new re-issue) Mr. J. E. Mitchell of the Central Criminal Court Bar. When the book first appeared, its author dwelt (and with good cause) upon the "enormous volume and variety" of the duties of a justice of the peace. What would he say of them, could he have lived till now, to gaze in intensified astonishment upon the bulk and complexity of the additions which the intervening years have made to that early enormousness? A complete account of the present-day duties of a local magistrate—such as was afforded at one time by Messrs. Greenwood and Martin, and happily is still periodically provided in an up-to-date form by the annual re-issue of Stone's *Justice's Manual*—must nowadays fill something approaching to

two thousand pages: pages, too, of technical, and consequently difficult, matter. At his first perusal of any such book, the newly appointed justice, however anxious to learn his work—is pretty certain—if not, like the traditional student of Euclid, to "shudder and slip away"—at any rate to shudder and shut the volume. He will not re-open it with pleasure and interest until after he has secured some brief and lucid introduction to his daily duties in court, just familiarising him with their broad principles and their most frequent topics. This *Note-Book* affords him that indispensable introduction. It makes no attempt to supersede or rival *Stone's Manual*, that Bible of the magistrates' clerk and the chairman of petty sessions. But, as a stepping-stone to that ultimately indispensable volume, lady magistrates, labour magistrates, and in short every one put into the commission of the peace without previous legal experience, will find the *Justice's Note-Book* invaluable.

Besides its merits of brevity and simplicity, the work has the advantage of presenting nine-tenths of its subject-matter in an alphabetical arrangement; which adds greatly to the reader's facility of reference. As this new issue of it comes so long as thirteen years after the latest previous edition, the present editor has had a great accumulation of fresh matter to deal with. He has handled it well: carefully following the example of terse brevity set by his predecessors, and exhibiting an accuracy which extends even to the figures in the index. Perhaps the addition of a chronological Table of Statutes and an alphabetical Table of Cases might have increased the usefulness of the book. But Mr. Mitchell has naturally been reluctant to impair its salient merit of a compact brevity.

C. S. K.

Federal and Unified Constitutions. A collection of constitutional documents for the use of students. Edited, with a historical introduction, by A. P. Newton. Longmans. (Price 15*s.*)

The Constitution of the German Republic. By Heinrich Oppenheimer. Stevens & Sons, Lim. (Price 10*s.* 6*d.*)

Federation is a fascinating subject to the student of political institutions. Here, if anywhere, he can pretend to play the scientist, analysing, classifying, collecting specimens, and, if not experimenting himself, at least criticising the experiments of others. Ranging from leagues of nations to unitary states, he can find subtle differences between federations and confederations, and unions, personal and real. But even if he calls himself a mere student of history he will be grateful for Professor Newton's handy collection of federal documents, beginning with the League of the Three Swiss Forest Communities in 1291 and ending with the German Constitution of 1919: if there are some that he is not likely often to turn to, it will be convenient to know they are there. The editor tells us he was cramped for space, and one must not complain too much of omissions. But it seems rather illogical to exclude the Swiss, while including the United States, constitutional amendments, well though the former illustrate the tendency of federal powers to increase at the expense of State rights. And one could wish that he had seen his way to give

one or two examples of the judicial interpretation of federal instruments; an extract or two from Marshall's judgments would seem more in place than even Lord Grey's Newfoundland despatches of 1846 and 1847. Professor Newton's historical introduction will also prove of value; he has a keen nose for anything federal, finding the essence of federalism in the "practical division of responsibility," as, for instance, in the British colonial system in the first half of the eighteenth century and the latter half of the nineteenth. On Page 15 one surprising sentence occurs: "In the English constitutional theory of the eighteenth century all sovereignty belonged to the King, but the monarchy was carefully limited and balanced." It is surprising even if we assume "eighteenth" to be a misprint—and there are several curious misprints in these pages. The introduction ends with another rather disputable statement, "Where full political sovereignty is based upon the votes of the people, there is no vital difference between the two forms of union (legislative and federal), and it is only a matter of practical convenience and political expediency as to which is adopted in a particular case." Surely this only holds good where public opinion is uniform throughout the territory. Where it is not, as in Canada, it may be of the greatest importance to a local minority that their control over, say, education should be guaranteed by an article in a federal instrument which the central legislature cannot alter. So, in the new Germany, where full political sovereignty is explicitly based upon the votes of the people, the attempt to create a unitary state was foiled by forces that could not be ignored.

On this last and highly interesting federal specimen—the rather pathetic Weimar Constitution of August, 1919—Dr. Oppenheimer has given us the first original commentary in English. Despite the use of a number of strangely un-English words and constructions, such as "flew" (for flowed), "approbate," "viable," "equilibrate," and one monstrosity, "polypragmasia," which is not even Greek, he has written an excellent and very suggestive book, lucid in exposition, penetrating in criticism, and concise in statement. He is familar with contemporary German political thought as well as with the course of recent legislation, and he refers constantly to the working of corresponding institutions in other countries. If less informative than Brunet, whose admirable commentary has now been translated into English, on the subject of recent party history, Dr. Oppenheimer has the advantage of two years' additional experience, and to an English reader his acquaintance with English legal and constitutional ideas is helpful. He explains with gentle irony how the German Solons tried to combine the best features, however mutually incompatible, of the chief modern constitutions. Their President is a medley of imposing powers and restraints that nullify them. They set up a responsible Cabinet, but traditional fear of the Executive and ignorance of the workings of responsible government demand that this Cabinet, too, shall be subjected to institutional checks; and they even think it necessary to instruct it to act on majority decisions, the chairman exercising a casting vote. The Referendum and the Initiative, as here provided for, the writer thinks unlikely to have any practical effect, and like other commentators he has his fling at the high-sounding futilities of the Grundrechte. In the Reichsrat, however, which he will not call a Second Chamber, he believes the framers of the Constitution have set up a body stronger than they intended, and he admires the spirit shown, in most difficult circumstances, by the Reichstag, which incidentally has taken the formation of

governments entirely out of the President's hands. He has good chapters on the Administration of Justice and the very interesting Federal Economic Council. And here we may ask, Why must Dr. Oppenheimer follow the bad example of H.M. Stationery Office in translating Reich "Federation" and Länder "States"? Surely this is to beg an important question and conceal an important change. If we call the Reichsrat "Federal Council," how are we to distinguish it from Bundesrat? This mistake is shared by Professor Newton, who, by the way, is content merely to summarise what is perhaps the most striking article in the whole document—Article 165, dealing with the formation of Workmen's and Economic Councils. And it is regrettable that Professor Newton has not corrected some of the really absurd mistranslations of the official version.

J. R. M. B.

A History of English Law. By W. S. Holdsworth, K.C., D.C.L. Vols. II. and III. Third edition, re-written. London: Methuen & Co., Lim. 1923. (Price £1 5*s.* each volume.)

If a lecturer on the history of any branch of English law can get through the hour without some reference to, or at least use of, Professor Holdsworth's *History of English Law*, he is to be pitied for incapacity to use a good thing when he has got it. We cannot add that we do not know what a researcher would do without it, for such knowledge has been within our own bitter personal experience, since we belong to a generation which was forced to do without it simply because it was not then written. Pollock and Maitland were always with us as far as Edward I.'s reign, but beyond that period it was impossible to resort to any one book that could form the starting-point of a piece of investigation. Reeves was reliable, but his history is sparse in references and is quite out of date. The tide of modern learning had obliterated many of his land-marks, and one could only speculate whether the age was to produce any worker with the courage and equipment to take up the tale where Pollock and Maitland ceased speaking. Into this breach stepped Dr. Holdsworth twenty years ago, and by continuous labour, if we may use a trans-Atlantic phrase, "delivered the goods." The volumes now before us have been considerably altered, partially re-written, and, where necessary, expanded. This has lengthened Vol. II. by 90 pages, and Vol. III. by 163. It was no more than one would expect in view of the stream of research which has poured forth since the last edition. Vol. II. takes in Anglo-Saxon antiquities and Part 1. of the mediaeval common law. This gives the background of the topic down to the 14th and 15th centuries. Part II., which occupies Vol. III., fills in the details of the picture by giving the development of the rules of law during that period.

In the space at our disposal, it is impossible to do more than select a few matters for comment. There is, we think, still a good deal to be said on the growth of the writ in the transition from the Anglo-Saxon to the Norman system. The outlines are indicated partly in Vol. II., partly in Vol. III. It is curious to trace the overlapping and dovetailing of the windy, religious, Anglo-Saxon charter first into the hermaphrodite writ-charter, and then into the business-like writ. A famous document of Cnut dated about 1020 begins: "Cnut cyning gret his arcebiscopas," and

at once reminds us of the "Rex vicecomiti salutem" of a later era; though religious feeling permeates it, it does not predominate. The change is a gradual one, for we have found a charter of only one year earlier which bemoans at length the loss of Paradise, consigns to hell those who infringe the terms of the gift, and passes somewhat breathlessly to the dikes and streams that mark the boundaries of the land conveyed. The Norman contribution to the history of the writ, scanty as its traces are, is also important. Professor Haskins has supplied several documents that are very helpful for the pre-Conquest period, and Mr. H. W. C. Davis' *Regesta regum Anglo-Normannorum* shows that we are well on the way to the writ of Glanvill's time, with a royal order between 1066—1070, which has wrested itself free from every element that we associate with the old charter—Biblical history, Adam, Eve, Lucifer, Paradise, hell, Judas Iscariot, and the redemption.

In the account of the Parliamentary records, Dr. Holdsworth notices what has unhappily become matter of common experience—the imperfection of the Record Commissioners' edition of *Statutes of the Realm.* Mr. Plucknett has recently confirmed many doubts as to the accuracy of some of their work on the earlier enactments. It is too much to hope that funds will be forthcoming for continuing Palgrave's scheme for a new edition, but a good deal of useful work might be done in the shape of a full critical commentary on the Commissioners' text of some of the pieces of legislation called or miscalled statutes.

In dealing with the various tongues in which our law is spoken, Dr. Holdsworth tells us on Fortescue's authority that lawyers could not plead, or judge, or read their books or reports in anything but French, and that what Fortescue said of the language in the fifteenth century was still true in the seventeenth century. Perhaps this needs some qualification; for it would appear from the full passage in the Preface to *Coke upon Littleton*, a portion of which Dr. Holdsworth cites, that, whatever may have been the practice in Coke's time as to reading and writing law-French, it was very rarely spoken then; and Fortescue himself indicates that, so far as speech went, it was becoming archaic even in his age.

Vol. II. supplies confirmatory proof of the lack of scholarship (which we have pointed out elsewhere) in an American translation of *Statham's Abridgment*, produced in 1915. It was possibly owing to the war that no review of this book (so far as we know) appeared in England, with the unfortunate consequence that it has a reputation in America far beyond its merits. It is not useless, but it is full of mistakes, some of which are pitfalls, and others of which are so silly that they could trap no one. On the topic of the Year Book Abridgments in general, we have given reasons in another magazine for our belief that there is no earlier edition of *Fitzherbert's Abridgment* than the one of 1516, and that the 1514 edition is an unsound bibliographical tradition.

As to *Brevia placitata*, it is worth noticing that the MSS. of it, which we have seen, exhibit such marked dissimilarities as to make it probable that something like thorough re-editing, if not revision, of the original text took place between the issue of the earliest and the latest copies of it. But until we can get Mr. G. J. Turner's printed edition, no final opinion on this can be safely expressed. The whole collection of tracts on mediaeval pleading shows a period when men were groping in the dark as to what ought to go into a law book, and when they no more thought of shepherding forms of pleading into one pen, cases into another, and exposi-

tion into a third, than early scientists thought of splitting up the sun's rays. When this is realised, we may get more light thrown on the origin of the Year Books, which we refuse to believe began at any fixed date, or in the brain of any one man. On the topic of the Year Books, we notice that Dr. Holdsworth thinks that, allowing for the differences between the Year Book and the modern report, cases are cited and distinguished somewhat (a revision for "much" in the earlier edition) in the same way in Henry VI.'s and Edward IV.'s reigns as in our time. It must be taken that this opinion refers to the minority—and a small minority—of the cases. The great majority of them as they appear in print scarcely justify the statement as one of general application. One cannot open at random a Year Book of Henry VI. or Edward IV. in the expectation of seeing counsel call the attention of judges like Brian, Paston, or Newton to this or that case in the Year Books, and a detailed scrutiny of a single year of Henry VI. has strongly confirmed this.

The learned author has very wisely doubled in length the chapter on Procedure and Pleading, and has made it one of the most valuable parts of either volume. We suggest that in the next edition no harm will be done by a further amplification of *absque hoc*. How exactly this "peculiar and barbarous formula," as H. J. Stephen described it, came to signify what it did, we have been unable to discover; but the translation of it in a current law dictionary as "except" not only fails to convey its true meaning, but makes nonsense of it. *Absque hoc* may perhaps be rendered "except" for the *Codex Theodosianus*; it will not do for English pleading.

We claim no originality for a small criticism which has been suggested to us by one of Dr. Holdsworth's numerous Cambridge friends. He says of the assize of novel disseisin, "But if the person disseised was on the land, he must take such proceedings within four days." Ought this not to be, "he has four days for re-ejectment"?

While this review was being written, Vols. IV. and V. have been published. They can give us no greater pleasure than the first three volumes, but we are sure that they will give us quite as much.

P. H. W.

A Treatise on the Anglo-American System of Evidence in Trials at Common Law. By John Henry Wigmore. 5 vols. Second edition. Boston: Little, Brown & Co. 1923. (Price 50 dollars.)

"Pro-di-gi-ous!" as Dominie Sampson thrice observed without getting any further, when a bag of gold was put in his hands. Viner's *Abridgment* exceeded these five volumes in bulk, but then Viner had not to answer the exacting demands of scholarship that are now current, he was troubled with no arrangement except an alphabetical one, and he was not much concerned in reducing to principles what he abridged. The toil involved in Professor Wigmore's second edition must have been nearly as great as that of writing the first. Fourteen thousand new judicial decisions have been examined, seven thousand fresh citations of statutes have been given, every word of the text has been scrutinised, many new subjects have been added, and the topical index has been completely revised. Some notion of the size of the treatise may be gathered from the fact that, before the

author begins his subject-matter, he has written nearly half as much as there is in Stephen's *Digest of Evidence*, and that his indices alone are nearly as long as the present edition of *Best on Evidence*. It may stagger an English lawyer to learn that four thousand eight hundred pages are needed to set out a branch of the law which he usually regards as tolerably compact and reducible to moderate compass. The explanation, of course, is that an American lawyer, if he is to deal with any branch of his system adequately, must treat of it as administered in some fifty different jurisdictions. No one grasps what this means until he has seen a complete set of American law reports, and no one fully realises all its implications until he has tried to track in these reports the American law on any particular point. "A judge," said a President of the American Bar Association, "may decide almost any question any way, and still be supported by an array of cases. Cases are our counters, and there are no coins. Our legal arguments are for the most part a mere casino-like matching and unmatching of cases, involving little or no intellectual effort. The law is ceasing to be a question of principles, and is becoming a question of patterns." We have been privileged to see in actual working not only the Supreme Court of the United States, but also some of the State Courts, and we humbly suggest that things are not quite so bad as this; but that they are bad enough is commonly admitted by distinguished American lawyers themselves, and a movement is happily on foot for reduction of parts of the law to authcritative statements of principle in manageable form. Perhaps the turn of the law of evidence will soon come, if it has not already come, for such treatment. We can say nothing in higher praise of Professor Wigmore's work than that we can imagine no one more admirably equipped to accomplish for that part of the law what we know is already being done for the conflict of laws and other legal topics. In fact, to a considerable extent, he has already done it. He describes the aims of the treatise as threefold; first, to expound the Anglo-American law of evidence as a system of reasoned principles and rules; secondly, to deal with the apparently warring mass of judicial precedents as the consistent product of these principles and rules; and thirdly, to furnish all the materials for ascertaining the present state of the law in the various independent American jurisdictions. If he had achieved no more than the first object, he would have done well, for, so far as our own system is concerned, the leading rules of evidence are frequently in peril of being fogged by the details of their application. A notable example is *R.* v. *Geering* (1849) 18 L. J. M. C. 215. The principle in it having been clearly admitted, one can only account for the reporting of some of the later decisions on its application by recollecting that in them a man's life depended on a matter of detail. Professor Wigmore's attempt to accomplish his other two aims demanded great courage, and his signal success in achieving them shows unusual patience and a profound knowledge of the law. We do not make the faintest pretence of having read through the five volumes, but we do claim to have studied enough of them to say that his exposition is such that it was very difficult not to go on reading indefinitely what he has written on any special branch of his subject. If we must single out one portion of the text that appealed to us especially, it would be that on *Res gestæ*, and yet that is but one example among scores of others. This phrase, which is perhaps the loosest in the law of evidence, is handled by the learned author with the firmness of touch characteristic of one who has

laboriously amassed his material, and with the perception of principle that shows his complete mastery of his cases.

An English lawyer will naturally ask to what extent he will find the treatise of practical utility. It is, of course, primarily written for American lawyers; but it takes account of English decisions as well, and is invaluable on any question of principle. To the historian and the researcher the work is essential.

Professor Wigmore's arrangement is occasionally open to argument. It is not obvious why the main discussion of cross-examination is tacked to the heading, "The hearsay rule satisfied." He might also have abridged the treatise here and there. Much of what is said on cross-examination consists of examples which illustrate the risks of indulging in it, or the success which sometimes attends it. These quotations would scarcely find a place in any ordinary work on evidence. Again, misconduct of jurors is akin to abuse of legal procedure rather than to modes of proof.

English lawyers who have suffered under Bentham's remarkable phraseology, not to mention the polysyllabic flatulency of some modern medical experts, may be excused for flinching at some of the vehicles for scientific expression which Professor Wigmore has constructed. We prefer the term "Real evidence" to "Autoptic proference," and "Varying the terms of a document" to "Integration of jural acts." And we may be acquitted of flippancy if we ask him why he does not use "Podoscopy" for "Foot-mark evidence," if he adopts "Dactyloscopy" for "Finger-print evidence." We make a present to him of "Odontoscopy" for the time when an expert witness will go into the box to prove that it was our own dog that bit us and not our neighbour's.

P. H. W.

A Treatise on Crimes and Misdemeanours. By Sir William Oldnall Russell, Knt. Eighth edition, by Robert Ernest Ross and George Buchanan McClure. 2 vols. London: Sweet & Maxwell, Lim. 1923. (Price £5.)

This work reasonably satisfies a demand peculiar to practitioners of English law, and that is, to have collected in one place a series of references to all the decided cases, rulings, and statutes on some special branch of the law, with a passable quantity and quality of exposition to connect them. Such books come between digests of case law and statutes, and true scientific treatises. They are something better than compendia and something far short of legal literature at its best. No one is ever likely to read them through, or to get from what he does read more than a glimmering of the broad general principles underlying any part of the law, or to gain the slightest critical appreciation of it. Authors and editors ignore everything except cases and statutes; the stream of scientific articles or books between edition and edition of their own compilations passes by them unheeded. Not that they are to be blamed for leaving out of their reckoning considerations foreign to their purpose. A manual of practical engineering would sell no better if it talked much about dynamics. *Russell on Crimes and Misdemeanours* differs not a whit from a score of such books, except that it has become sufficiently authoritative to be cited in Court now and again. It would be safe to say of it, even if we did not know such to be the fact,

that a work of this size which has reached its eighth edition is urgently wanted and is generally reliable. Sir James Stephen, in one of his blunt criticisms of our literature on criminal law, compared the bad arrangement of that topic in Justinian's *Digest* to the edition of *Russell on Crimes*, then current, and said that the *Digest* was certainly not better arranged, though *Russell on Crimes* was arranged exceedingly ill. But Stephen forgot or ignored the fact that arrangement is of minor importance in such books. What is required is a good index and the inclusion in the text of some account of every relevant precedent or enactment. The two essentials are accuracy and completeness. The present edition has made up the leeway between 1909 and October, 1922. It has fallen into the hands of competent editors. If they have not revised all the foot-notes, it is merely because the labour of doing so would have made any busy man refuse to undertake a new edition at all. We have found *Russell on Crimes* of such great assistance in a close examination of a few divisions of criminal law that, in common gratitude, and in no carping spirit, we suggest the following amendments for the next edition: P. 151, *R.* v. *Thorp*, reference should be 5 Mod. not Mood.; and Comb. 456, not 228; p. 152, *R.* v. *Nichols*, reference should be 13 East, not 12 East; p. 165, note (*o*), for 13 Cl. & F. read 11 Cl. & F.; p. 547, note (*n*), 1 Hawk. c. 81, s. 11 (not 14); p. 549, note (*l*), 1 Hawk. c. 83, s. 10 (not 12); p. 553, note (*i*), 1 Hawk. c. 83, s. 7 (not 8); p. 559, note (*f*), 1 Hawk. c. 85 (not 86); p. 560, note (*g*), 2 East, 14 (not 416); p. 562, note (*p*), 9 Q. B. D. (not 6 Q B. D.); note (*u*) 3 Salk. (not 1 Salk.); p. 463, note (*a*), 1 W. Bl. (not 2 W. Bl.).

P. H. W.

A Treatise on the Statute Law. By William Feilden Craies. Third edition, by J. G. Pease, C.B.E., and J. P. Gorman. London: Sweet & Maxwell, Lim. 1923. (Price £1 17*s.* 6*d.*)

This book is so closely associated with the late Mr. Craies' name that its foundation of *Hardcastle on Statutory Law* is generally forgotten. The re-writing of the original work was perhaps the best of the many good things produced by Mr. Craies' ability and industry. We have been greatly indebted to the last edition of it, and the profession may congratulate itself that the current edition has fallen into the skilful hands of Mr. Pease. He has saved space by abridging or omitting quotations from judgments which merely repeated principles elsewhere adequately developed, by leaving the appendix of judicial definitions of words used in statutes to legal dictionaries, and by dispensing with the greater part of the index of short titles. He has also resisted the temptation of turning his author's work into a mere digest; for he has incorporated only those cases decided since the last edition which really expound the rules of interpretation instead of merely exemplifying their application. This last process is a delicate one, and the exercise of discretion which it involves must necessarily be a matter of opinion. It explains justifiably the omission of a case like *Mousell Bros., Lim.* v. *L. & N. W. R. Co.* [1917] 2 K. B. 836, but we think that it might have been worth while to make a bare reference to *In re Maryon-Wilson's Estate* [1911] 2 Ch. 58; and illustrations of the Court's authentication of statutes are not so common as to make inexpedient passing mention of what occurred in *R.* v. *Case-*

ment [1917] 1 K. B., at p. 134. There the Court of Criminal Appeal referred to the Parliament Roll and the Statute Roll in order to verify the words of 25 Ed. III. stat. 5. c. 2.

So far as we have tested it, Mr. Gorman's revision of the proof-sheets and indices is satisfactory.

P. H. W.

The Law of Torts. By Sir John Salmond. Sixth edition. London: Sweet & Maxwell, Lim. 1924. (Price £1 10*s.*)

This well-known work has one of the best recommendations that any law book can have; it has been studied for years by candidates for the honours examinations throughout the English universities. We have been familiar with it from the first edition to the fifth, and we heartily welcome the sixth. All questions of difficulty that can trouble the student—and several additional ones have arisen since the last edition—are grappled with, and, if no dogmatic answer is given to some of them, it is because none can be given. The analysis of the principle or lack of principle underlying the doctrine of contributory negligence is especially useful. Among the most recent decisions, we were particularly curious to see how Sir John Salmond would treat *In re Polemis and Furness, Withy & Co.* [1921] 3 K. B. 560. He has done so at such length that § 36 (Remoteness of Damage) has swelled from ten pages to forty. We can only hope that the House of Lords will have given, before the learned author's next edition, some decision that will enable him to reduce them to the original number; for, on principle, one of the worst things that can befall an institutional book is the very thing that nearly always does befall it—increasing bulk. As to the *Polemis Case* itself, it may be doubted whether, so long as juries have any say in an action for negligence, the law as there laid down by the Court of Appeal is likely to lead to results differing much from those arrived at under the previous law. Even under the rule in the *Polemis Case*, no defendant is liable unless the damage is the direct consequence of his conduct, and "direct," whatever it may mean, seems to be as elastic as "reasonable" in the phrase "reasonable man." Is there really much difference between a direct consequence and a consequence which a reasonable man would foresee? Passing to other topics in the book, it may be suggested that the last word has yet to be said on the theoretical foundation of the law of torts; nor are we at all satisfied that the correct way of dealing with negligence in this branch of the law is not to discuss it under two distinct heads, first as one of the conditions grounding liability in various torts, and secondly as an independent tort. In several points we suggest that the law is more consistent with itself than Sir John Salmond will allow; thus in *Mintz* v. *Silverton* (1920) 36 T. L. R. 399, and *London Association, &c.* v. *Greenlands, Lim.* [1916] 2 A. C. 15, reasons are clearly given by the Court which, whether they be sound or unsound, enable us to distinguish these cases from *Lloyd* v. *Grace, Smith & Co.* [1912] A. C. 716, and *Macintosh* v. *Dun* [1908] A. C. 390, respectively. However, if we differ on these and other matters from the author, it is only a tribute to the intellectual ferment which he sets up in his wide circle of readers.

P. H. W.

Oxford Studies in Social and Legal History. XIII. Early treatises on the practice of the Justices of the Peace in the fifteenth and sixteenth centuries. By B. H. Putnam, Ph.D. Oxford: The Clarendon Press. 1924. vi. and 424 pp. (Price, 18*s.* net.)

In this volume Miss Putnam prints for the first time two manuscripts of the greatest importance for the history of the office of Justice of the Peace, one being a 15th century collection of Precedents and one an early 16th century 'Reading' on the Peace; and incidentally takes occasion to review the whole history of that most remarkable and characteristic of our English legal and social institutions. In a short preface, Sir Paul Vinogradoff calls attention to the great interest of the 'Readings' as the most systematic form of law teaching provided by the Inns of Court at a time when 'the Year Books were falling into decay while the Reports had not yet risen to form a special class of legal literature'; he also emphasizes the importance of the subject of this book for historians of all kinds. One might almost have been tempted to say that the latter was a self-evident proposition, were it not for the really remarkable extent, upon which Miss Putnam later comments, to which this institution has been neglected by legal and other writers; a neglect which can only in part be explained by the very scattered nature (at least for the earlier period) of the records from which the activities of these Justices may be discovered. After all we need not, perhaps, be so surprised at our own ignorance in the matter considering the ignorance of the Justices themselves at certain periods as to their own powers, a point upon which Miss Putnam has an illuminating passage.

Miss Putnam, indeed, laments that the neglect of the subject by those learned in the law should have led to its being handled by herself, who is not technically so equipped. It is not, we think, a regret which will be shared by anyone else; for she was almost the only person marked out by previous work to attempt the task, and it may be said at once that she has achieved a very striking success. In addition to a mass of information entirely new, everything of historical importance, so far as we can judge, which has been published on the subject in ancient or modern times, is here summarised, criticised and placed in its proper relation to the study of the institution as a whole. The book does not hide the existence of plenty of problems still unsolved: it is, indeed, one of its merits that it lays them temptingly before the eyes of possible aspirants. To any such it will be an invaluable introduction, and to all historians and lawyers it must be reckoned an indispensable work of reference.

The introduction includes a short but sufficient summary of record sources for the earlier history—mostly untapped as yet; follows a close analysis of the printed treatises from 1506 to 1599, a bibliography of which is given in Appendix I., Miss Putnam being led to the conclusion that Sir Anthony Fitzherbert had no connection with the *Boke of Justices of Peas* of 1506, in spite of the similar title (in English) of his own book of 1538. The contents of the *Boke*, part Statutes and part Precedents, are then traced back to their MS. sources in the 15th century; the most important of which is the interesting compilation, made apparently about the year 1422 for Worcestershire Justices, which Miss Putnam has discovered in one of the *Miscellaneous Books* of the Augmentation Office,

and which she prints in her Appendix II. By the way, she is a little optimistic in the conclusions she draws (p. 80) from the fact of its preservation in the Augmentation Office; which gives us, it is true, a probability that the work was once the property of a house of religious, but by no means a certainty, viewed the infinite variety of adventures that may have befallen almost any one of this class of the Public Records. The history of the Pershore Cartulary before it came into the possession of this same Court of Augmentations is a case in point. We also note in this section a curious verbal slip by which Miss Putnam gives (p. 93, note 1) what may be a misleading impression that actual seals of the Justices may be found in a certain roll of Foreign Accounts.

An exhaustive analysis of the relations of Fitzherbert's work to those of his successors, Lambard and Crompton, brings us to the second of Miss Putnam's chief *trouvailles*—Thomas Marowe's 'Reading' on the Peace in 1503, a work apparently unknown to Fitzherbert but quoted freely by the other two. The editor has located no less than eleven MSS. of this, and prints (Appendix III.) one in the Cambridge University Library, with a few selected variants. The two chapters devoted to this work form perhaps the best part of the whole book. An admirable biography of Marowe (who is unknown to D.N.B., though Foss and Dugdale have paid him some small attention) is a model of the way in which patient gleanings from printed calendars and other sources should be presented; and is lightened by many pleasant touches such as Marowe's description of his wife: while the analysis of his methods (p. 163) and the revelation of Lambard's indebtedness to him sufficiently justify the importance here assigned to his work. Miss Putnam incidentally discusses at this point all kinds of problems connected with the Justices of the Peace, such as that raised in connection with the still quoted Statute of 34 Edward III.

We are able up to this point to praise this book so unreservedly that we may be forgiven if in conclusion we criticise it in two aspects. One is that of the rendering of the MSS. in the Appendices. Miss Putnam is palæographically rather more bold in her dating than we should care to be (pp. 81, 149, 154); but our concern is more with her actual text. One must make most sympathetic allowance for an editor dealing in America with transcripts supplied from England, and the Augmentation Office document is not in good condition; but even so the text, where we tested it, is too full of small errors—errors of the original passed without comment and errors imported by the transcriber. An even more serious matter is Miss Putnam's frank admission that her editorial methods (is this, we wonder, a general policy of the series?) are governed purely by consideration of legal content. 'Lawbooks for the Lawyers' may be a good cry, but if the lawyer takes the attitude of not troubling (*e.g.*) about the local historian, the local historian may retaliate; and it really is essential, considering the mass of our materials and the difficulty of getting them published, to secure co-operation between all publishing bodies.

The trouble is intensified when we come to the index. Miss Putnam gallantly takes responsibility for this, though she did not make it; but we cannot believe she really thinks that a book of over four hundred pages, packed with detail, can be adequately indexed in ten. Such constriction means the exclusion not only of all non-legal interests but also of any reasonable attempt at grouping of subjects and cross reference. It has

also, apparently, meant the exclusion of all the Appendices; so that the existence of an interesting case, for example, on Lollardry and Necromancy is successfully concealed.

Our criticism of these blemishes must be taken as a measure of our admiration of the rest of the book.

HILARY JENKINSON.

The Romance of the Law Merchant. By WYNDHAM A. BEWES. With a foreword by the RT. HON. LORD JUSTICE ATKIN. London: Sweet & Maxwell, Lim. (7*s.* 6*d.* net.)

A ROMANCE is a "tale with scene and incidents remote from every-day life," and the story told by Mr. Bewes is certainly a romance. In his endeavour to unearth some of the *incunabula* of the law merchant he takes us with him along many of the trade routes and curious by-paths of the ancient world and introduces us to many ancient customs of trade, in which are recognisable the origins of rules and institutions of the greatest modern importance, such as limited liability, demurrage, market overt, the vendor's lien for unpaid purchase-money, etc. In the first half of the book the method of treatment is to examine various branches of the law merchant separately, sale, insurance, shipping, partnership, consuls, and the finance of commerce. The second half, after dealing with the mediaeval fairs and the general course of trade in the Middle Ages, proceeds to discuss the law merchant in relation to various countries and cities—Venice, Genoa, Spain and Portugal, England and Scotland. The general impression left on the reader's mind is that the author has attempted too much in one hundred and forty pages. He has ranged far and wide for his materials and has produced a series of chapters which are tantalising both to the lawyer and to the layman. But there is not enough on any one topic, and we very much hope that the author will select a few of the truly romantic lines of research which he has opened up and follow them right through to the beginning. For instance, most lawyers are familar with the conception of the law merchant as being originally a kind of European private international law for the regulation of commerce; but Mr. Bewes opens up a fascinating vista of the East, from which it is evident that our commercial system is under quite unsuspected obligations to the Saracens, the Phœnicians, and perhaps even to the Chinese. In so short a book it can be no more than a vista, and we should like to see Mr. Bewes, who has done such attractive pioneer work, setting out on that "golden journey."

A. D. McN.

An Introduction to the History of English Law. By HAROLD POTTER, LL.B. Sweet & Maxwell, Lim. 1923. (10*s.* 6*d.* net.)

THIS short work is calculated to supply the long felt want of an elementary text-book presenting the main outlines of English legal history in a succinct, yet accurate, form for students commencing the study of the subject. But for some defects of style we should be able to say that Mr. Potter has discharged this task in an entirely satisfactory manner. He

gives evidence of extensive reading and an accurate appreciation of the literature on the subject. But the constant recurrence of tautological phrases is a source of irritation to the reader, and mars what is otherwise an excellent work. Such phrases as "It would be difficult in a short space," "It is impossible in a small compass," or something similar in effect, recur with annoying frequency. These are matters which may easily be remedied in another edition, which we expect and hope will be called for in due course. We have noted a few venial errors, some probably due to the printer, *e.g.*, on p. 35, *scaccarius* should be *scaccarium*; on p. 29, line 9, *Court* for *Cnut*; and on p. 30, *Quod* mistranslated *because*. The composition of paragraph 3 on p. 201, is so involved as to be hardly intelligible. In fact we think that Appendix A needs re-writing throughout.

D. T. O.

The Sources of Law in the Swiss Civil Code. By Ivy Williams, B.C.L., M.A. (Oxon.), LL.D. (Lond.), Barrister-at-Law. Oxford University Press. 1923. 199 pp. (Price 7*s.* 6*d.* net.)

The main purpose of this work is the discussion of the sources of law set out in the first section of the Code, the formal sources, be it understood, for Dr. Williams is only concerned incidentally to tell us something of the materials from which the contents of the Code were derived. But, in fact, the usefulness of the book is far greater than its title would suggest, for it really forms an extremely readable introduction to the study of the latest of the great continental codes. Indeed, although the author is careful to point out the important differences in method which separate the Swiss from the French, and more especially from the German Code, the English lawyer can, nevertheless, get from her sketch an idea of code law as it is applied in Europe to-day, which it would be difficult for him to find in any other work in his own language. The system, for instance, by which the whole law of tort is worked out from a few general principles enunciated in the code is really common to all modern codified law (although the German Code especially has a considerable number of subsidiary provisions), and a reader can learn much that is of interest as to the theory and practice which it involves from Dr. Williams' fifth chapter.

The chief interest, however, necessarily centres round the provision of Section 1 which directs the judge, in default of statute or customary law applicable to the case before him, to decide according to the rule which he himself would lay down were he a legislator. Dr. Williams shows that, in fact, this provision has never yet been invoked as the basis of any judgment, nor is this surprising when we consider the, to our minds, enormous field left in other parts of the Code to judicial discretion. But its theoretical importance remains: it is the recognition for the first time in any code that the word "interpretation" can no longer be made to do duty for all the functions of a judge, and by its honesty acts as a useful safety valve for those tendencies which might otherwise issue in the acceptance of the "free law" school's doctrines.

H. F. J.

The Egyptian Law of Obligations. By Frederick Parker Walton, Advocate of the Scottish Bar, K.C. (Quebec), B.A. (Oxon.), LL.B. (Edin.), LL.D. (Aberdeen and McGill). Second edition. London: Stevens & Sons, Lim. 1923. Vol. 1, xl. and 400 pp. Vol. 2, xx. and 631 pp. (£2 10*s.* net.)

These two volumes contain what is primarily a commentary on Egyptian Law, but as both the Native and the Mixed Code follow the law of France closely, a commentator, like the Courts themselves, has to base his work to a great extent on French literature and practice. Mr. Walton has regarded this necessity as a welcome opportunity, and has given us not only an admirable text-book but also a valuable contribution to the study of comparative law. The particular importance of his work is that it provides, the English reader with an opportunity of studying the whole system of jurisprudence which is based on the Code Napoléon, for the materials have been drawn not only from France but also from the chief systems derived from French law, including that of the province of Quebec. It is perhaps to be regretted that the author has not confined himself to these materials, but has added in some cases substantial accounts of English and also of German and Swiss law. English law does not lend itself well to treatment side by side with a foreign code because many of its fundamental categories are different, and references to equity are more likely to confuse than help the reader who does not known a fair amount about it already. The German law, it must be admitted, does, especially in the more theoretical parts, help the exposition considerably. This may be seen, for instance, in the working out of the *droit propre* theory in the German Code with regard to stipulations for the benefit of third parties.

Mr. Walton has wisely refrained from translating French technical terms and has often left long passages from French authorities in the original. Sometimes he has even gone so far as to use English words, such as "jurisprudence," "repetition," "give" in a sense which would not be intelligible to anyone unacquainted with French; it cannot, however, be likely that many such will read the book, and the author's method probably adds to the lucidity which is one of his greatest merits and enables his work to be read with ease in spite of its bulk and learning.

H. F. J.

Covenants Affecting Land. J. C. V. Behan. Sweet & Maxwell, Lim. xxiv. and 174 pp. (Price, 15*s.* net.)

This book is a thesis for the *Melbourne Doctorate of Law* written by the Warden of Trinity College in the University of Melbourne, whose remarkable career at Oxford is one of the most distinguished that has been achieved by a Rhodes scholar. Its readers will not hesitate to endorse the prophecy made in the foreword by Professor Holdsworth and Dr. Strahan, by anticipating that Dr. Behan will take a high place among the younger of present day lawyers who are devoting work to the literature of real property law.

The books falls into two parts, the introduction of 58 pages, which contains a general jurisprudential discussion, and the main body, which

contains the law as to the operation of covenants affecting land, set out in two chapters entitled respectively the Doctrine of the Common Law and the Doctrine of Equity. These two chapters give much the most lucid account that has yet been written of a difficult branch of law. The difference between the common law affecting the relation between vendor and purchaser, and that affecting the relation between lessor and lessee is clearly brought out. In the section dealing with the latter the terminology used in consistently accurate, so that the reader has no excuse if he does not keep continually in view the distinction between the fact of the benefit or burden of a covenant running with the reversion, and that of the benefit or burden of a covenant running with the land (a phrase which, as Dr. Behan points out, is compendious for "running with the estate for years in the land"). Care in the use of terminology in this connection has not always been observed, either by writers or by judges, to the confusion of students, if not of maturer lawyers.

The reviewer ventures to suggest the following change in the arrangement of the subject-matter: that Sections III. and IV. of the Introduction entitled "Basis of the Equitable Doctrine Respecting Restrictive Covenants," and "Examination of the Modern Explanation of the Equitable Doctrine," shall be placed at the end of Chapter II. It seems that in the interest of readers unfamiliar with the subject a statement of the doctrine of equity should precede an examination of the basis of that doctrine. The two sections referred to are the most interesting in the book and also the most contentious. The author does not appear to have kept the historical basis of the doctrine clearly distinct from the analytical basis. In criticising judges who have adopted the analogy of the easement, he seems to lose sight of the fact that it is only by means of that analogy that the rule has been evolved that a restrictive covenant can be enforced only by a person who owns land for the benefit of which this covenant has been imposed. There would be even less opportunity than there is for the law to develop by means of judicial decision if judges, when applying to new facts an analogy drawn from the law relating to an already familiar situation, felt bound to satisfy themselves that the analogy is analytically complete. Analogies must be sufficiently convincing to satisfy professional instinct, if more were required they would cease to be an effective instrument for legal growth.

Dr. Behan seems to prefer on its merits the view that in order that a restrictive covenant may be enforceable there must be a *quasi*-dominant tenement, which was followed in *London County Council* v. *Allen* [1914] 3 K. B. 642, to the contrary opinion which seems to have been assumed in *Catt* v. *Tourle* (1869) 4 Ch. App. 654; and *Luker* v. *Dennis* (1877) 7 Ch. D. 227; but does not give his reasons. After stating his preference on page 38, he adds, with reference to Scrutton, J.'s judgment in *London County Council* v. *Allen*: "The implied proposition that Courts of Equity should endeavour to mould doctrines which refer exclusively to matters of private right in a manner calculated to promote some supposed interest of the public, is as novel and startling as it is indefensible. It may, with all respect, be suggested that it should be the sole aim of the Courts to function in a manner which tends least to the disturbance of individual interests, and that the redress of public ills should be left to legislative action." The soundness of the statements of law and of policy contained in this passage may well be questioned.

Comment is made on page 8 on the fact, which has long seemed to the

reviewer curious, that "the ordinary text-books on real property, by what seems a singular conspiracy of silence among these authors, rarely devote more than a passing notice" to the rules of law regarding the normal use and enjoyment of land. Honourable mention should be made of Leake and of Theobald as not being parties to this conspiracy.

H. A. H.

The Civil Servant in the Law and the Constitution. By C. S. Emden. Stevens & Sons, Lim. (6*s.* net.)

This is a valuable piece of work in a field which, as the author observes, cannot be adequately covered in general works on constitutional law. The obscurity and intricacy of the law on the subject is, of course, due very largely to historical reasons. It is characteristic, for example, that the very doubtful blessing of the absence of *droit administratif* should be largely due to a reaction in the Middle Ages against the fairly complete system of that kind which existed in England up to the reign of Edward III. It would not be correct to say that the civil servant in still regarded by the law as a member of the personal household of the King, but the term has not yet been subjected to authoritative general definition, and generally, in Dr. Emden's words, the lawyers' terminology has not kept pace with political evolution, and has not provided for the distinction between the personal function of the King and the governmental function of the State. Hence, the looseness of legal language, against which Maitland inveighed, in alluding to what is indifferently described as the State, the Crown, the King, the government, and the public. The author's comment on the decided cases of one branch of his theme might be applied to the law on the subject generally. "They would," he writes, "be difficult to reproduce in an accurate set of rules. There are decisions which are not easily reconciled. But the law on the subject is specially interesting to the constitutional lawyer and the political scientist." To them this book can be heartily commended and also to the civil servant, who will find not the least useful portion of it the appendix, where the provisions of the various Acts relating to superannuation and gratuities, whose to him not unimportant ambiguities are fully discussed in the text, are given in full.

R. S.

Jurisprudence. Seventh edition. By Sir John Salmond. London: Sweet & Maxwell, Lim. 1924. xviii. and 580 pp. (£1 net.)

The present edition of Sir John Salmond's well-known work contains a number of extensive alterations. They do not, however, represent any material departure from the essential doctrines of the earlier editions. Perhaps the most important change is contained in the chapter on "Customary Law." The view is now expressed that immemorial antiquity is not required on the part of the general custom of the realm. This is in accordance with the doctrine held by most of the other authorities. He discusses *Goodwin* v. *Robarts* and *Crouch* v. *Crédit Foncier of England*, but omits the recent cases of *Bechuanaland Exploration Company* v. *London Trading Bank* [1898] 2 Q. B. 658, and *Edelstein* v. *Schuler & Co.* [1902] 2 K. B. 144.

There have also been some important alterations of arrangement. From the standpoint of the teacher, the most valuable one is the transposition of Chapters II. and III. of the earlier editions. Students were formerly confused by the fact that the chapter on "Civil Law" preceded the chapter on "Law in General."

A short bibliography has been added to the appendix. In the next edition Cardozo's *The Nature of the Judicial Process*, Roscoe Pound's *Interpretations of Legal History*, and Hohfeld's *Fundamental Legal Conceptions*, should certainly be included. The omission of the latter book is particularly remarkable, as Professor Hohfeld deals with the question of liberties and powers at much greater length than it is possible for Sir John Salmond to do in the limited space at his disposal. They are in agreement that liberties and powers have no correlative duties.

In the introduction, which deals with the science of jurisprudence, there is a particularly interesting section in which English and foreign jurisprudence is compared. The author suggests that the great divergence between the juristic thought and literature of England and that of the Continent is to be found primarily in a certain difference in legal nomenclature:

"The English word 'law' means law and nothing else, but the corresponding terms in Continental languages are ambiguous and mean not only law, but also right of justice. *Recht, droit* and *diritto* all have this double signification."

Plausible as this theory may sound, it is doubtful whether it is actually correct. The word *jus* had the same double signification, but the Romans were as essentially practical as the modern English jurist. Is not the difference due rather to the fact that for over six hundred years English justice has been centralised and efficient, while that on the Continent has been in a constant state of flux? It has been unnecessary to justify the existence of law to the English reader. Perhaps the recent popularity of philosophic legal discussion in America is due to the fact that the administration of law is less certain in that country than it is in England.

In dealing with conventional law on page 30, Professor Salmond says:

"In many cases Conventional Law is also Civil Law; for the rules which persons by mutual agreement lay down for themselves are often enforced by the Courts of Justice of a state."

It is submitted that this statement is incorrect. The Courts of Justice generally enforce the rules which persons agree upon, but they merely consider these agreements as questions of fact. There is a general law of the State that contracts will be enforced. A contract or agreement between two persons brings this general law into operation.

In every book dealing with jurisprudence as a whole, the crucial point is the definition of civil law. Thus, if we accept Austin's "command" definition all his other theories and definitions must also be accepted. The definition of law is the logical corner-stone upon which the science of jurisprudence is based. Professor Salmond's definition of civil law is as follows:—

"Law may be defined as the body of principles recognised and applied by the State in the administration of Justice. In other words, the law consists of the rules recognised and acted on by Courts of Justice."

Admirable as this definition may be as an ideal, it can hardly be accepted as a practical solution of the question. The obvious answer to it is that it does not include laws which are unjust. Such rules nevertheless

are laws. A definition of the whole must include all of the parts. A minor criticism of this definition is that certain laws are recognised and enforced solely by administrative officers, and the Courts of law are not permitted to take cognizance of them. This has always been true on the Continent and can even be found in exceptional cases in England, as, for example, in the case of the exclusion of aliens. As Professor Pound has pointed out, administrative law has been developing rapidly in the United States, and many questions are no longer justiciable in the Courts of law. Is not the primary purpose of law order rather than justice? Law and order are two terms which cannot come into conflict. Law and justice are terms which, unfortunately, are frequently contrasted.

On page 277 Salmond defines "ownership" as follows:—

"Ownership, in its most comprehensive signification, denotes the relation between a person and any right that is vested in him. That which a man owns is in all cases a right. When, as is often the case, we speak of the ownership of a material object, this is merely a convenient figure of speech. To own a piece of land means in truth to own a particular kind of right in the land, namely the fee-simple of it."

In discussing this definition, Professor Cook, of the Yale Law School, in his introduction to Hohfeld's *Fundamental Legal Conceptions* (page 12), writes as follows:—

"From the point of view of one who understands the meaning of the eight fundamental legal concepts, it would be difficult to pen a more erroneous passage. To say that A owns a piece of land is really to assert that he is vested by the law with a complex—exceedingly complex, be it noted—aggregate of legal rights, privileges, powers and immunities—all relating, of course, to the land in question. He does not own the rights, etc., he has them; because he has them, he 'owns' in very truth the material object concerned; there is no 'convenient figure of speech' about it To say that A has the 'fee-simple' of a piece of land is, therefore, to say not that he 'owns a particular kind of right in the land,' but simply that he has a very complex aggregate of rights, privileges, powers and immunities, availing against a large and indefinite number of people, all of which rights, etc., naturally have to do with the land in question."

Entirely apart from the difficult question as to whether or not Professor Hohfeld's eight fundamental legal concepts are valid or not, Professor Cook's argument seems to the reviewer to be incontrovertible.

On page 406, in discussing *jus necessitatis*, Professor Salmond says:—

"The *jus necessitatis* is the right of a man to do that from which he cannot be dissuaded by any terror of legal punishment."

This view of the law was definitely repudiated in the case of *Reg.* v. *Dudley & Stephens*, L. R. 14 Q. B. 273, in which Lord Coleridge said:—

"To preserve one's life is generally speaking a duty, but it may be the plainest and highest duty to sacrifice it. War is full of instances in which it is a man's duty not to live, but to die."

The *jus necessitatis* means public and not private necessity, and ought to be included under the heading of public policy. A short quotation from Professor Kenny's *Outlines of Criminal Law* will make this clear. Page 74:—

"*Necessity.* The fact that a man who has inflicted harm upon another's person or property, did so for the purpose of saving the community from a much greater harm, has from early times been recognised as a defence in civil actions, brought to recover compensation for the harm thus inflicted.

It is admittedly no tort to pull down houses to prevent a fire from spreading, or to enter a person's house to put out a fire. It is, therefore, natural that such necessity should be still more readily admissible as a defence to criminal proceedings."

Chapter 16 on "Titles" is so arranged that the student is apt to think that agreement is the only source of title. It would be more convenient to have one chapter dealing with the general questions connected with title, and a number of other chapters dealing with the particular facts giving rise to a title.

Whatever criticisms may be levelled against some of the reasoning in Professor Salmond's book, the fact remains, however, that it is the most convenient and comprehensive summary in the English language of the important subject of analytical jurisprudence.

A. L. G.

Fundamental Legal Conceptions. By Wesley Newcomb Hohfeld. Edited by Walter Wheeler Cook. Yale University Press, Newhaven, U.S.A. London: Humphrey Milford. 420 pp. (35*s.* net.)

The late Professor Wesley Newcomb Hohfeld, of the Yale University Law School, was one of the clearest and most original thinkers among the modern teachers of law. His death at an early age has proved a severe loss to the development of the science of jurisprudence. Professor Hohfeld was above all an analytical jurist, but, at the same time, he had a full equipment of historical and philosophic knowledge at his command. His interest in jurisprudence was not primarily determined by a love of theoretical discussion. His analytical work shows that he intended his book to be a means to the satisfactory solution of present legal problems. As Professor Cook says in his admirable introduction:

"Legal analysis to him was primarily a means to an end, a necessary aid both in discovering just what the problems are which confront Courts and lawyers, and in finding helpful analogies which might otherwise be hidden."

The reader of these essays will be struck by another characteristic which makes this book particularly stimulating—the intellectual honesty and thoroughness of the author. Professor Hohfeld in developing his system did not slur over the various criticisms which could be raised against it. The book, therefore, is of the greatest possible value to all students of jurisprudence, whether they agree with Professor Hohfeld's conclusions or not.

The present volume contains all the most important of Professor Hohfeld's published works. The Oxford and Yale University Presses are to be congratulated upon the excellent form of this book. The only criticism which can be made is that a work of this importance deserves a more complete and accurate index.

It is impossible to discuss adequately in a short review the various original ideas which Professor Hohfeld brings out so clearly in these 400 pages. As is already well known to most students of jurisprudence, he set

forth eight fundamental conceptions in terms of which he believed all legal problems could be stated. He arranged them in the following scheme:—

"Jural Opposites.	Right,	privilege,	power,	immunity,
	no-right,	duty,	disability,	liability.
Jural Correlatives.	Right,	privilege,	power,	immunity,
	duty,	no-right,	liability,	disability."

He, therefore, differs at the outset from the generally established theory that all legal relations can be stated in the terms of "right" and "duty." According to him, the term "right" must be distinguished from privilege, power and immunity. In the latter three cases there is no correlative duty. This is a view which has been advanced in a more tentative fashion by Terry in *Leading Principles of Anglo-American Law*, and Salmond *Jurisprudence*. Whether the reader agrees with, or differs from, this view of Professor Hohfeld's, there is no question that the author has stated it in clear and original terms, and that no student of this subject can afford to ignore his arguments. There are two objections to Professor Hohfeld's theory which may be tentatively put forth, but, of course, any answer to an important book of this size cannot be comprised within a few paragraphs. The first objection to these fundamental legal conceptions is their complexity. The Courts and legal writers have been accustomed to dealing with the two fundamental ideas of rights and duties, and to substitute for them a new and difficult list of eight sharply contrasted terms is now impossible. A more fundamental objection is to be found in the argument that privilege, power and immunity necessarily involve the idea of duty. My power to make a will is of legal importance, because there is a duty upon the Court to see that it is properly carried out by the executor. If there were no duty attached, then a will would be merely an expression of hope. On pages 40 and 41, Professor Hohfeld discusses Professor Gray's well-known example, contained in *The Nature and Sources of the Law*, of the right to eat a shrimp salad. His discussion of this passage is too long to quote at length, but the last three sentences may be given:—

"A, B, C and D, being the owners of the salad, might say to X: 'Eat the salad, if you can; you have our license to do so, but we don't agree not to interfere with you.' In such a case the privileges exist, so that if X succeeds in eating the salad, he has violated no rights of any of the parties. But it is equally clear that if A had succeeded in holding so fast to the dish that X couldn't eat the contents, no right of X would have been violated."

Does not Professor Hohfeld in this passage confuse two different rights? X clearly has no right to eat the salad, but he has a right to try to eat the salad. These are two different kinds of rights, and, therefore, the duties attached to each are different also.

Professor Hohfeld then discussess the difference between a right *in personam* and a right *in rem*. The following quotation from page 72 will bring out more clearly than anything the reviewer can say the important views of the author upon this difficult subject:—

"A paucital right, or claim (right *in personam*), is either a unique right residing in a person (or group of persons) and availing against a single person (or single group of persons); or else it is one of a *few* fundamentally similar, yet separate, rights availing respectively against a few definite persons. A multital right, or claim (right *in rem*), is always *one* of a large *class* of *fundamentally similar* yet separate rights, actual

and potential, residing in a *single* person (or single group of persons) but availing *respectively* against persons constituting a very large and indefinite class of people."

Professor Hohfeld then discusses the question whether or not there can be equitable rights *in rem*, and on page 111, he reaches the following conclusion:—

"On what possible ground, therefore, even assuming that equity could 'act only *in personam*,' could it be said that for that reason there could be no equitable primary rights *in rem*, *i.e.*, multital rights? If the usual legal proceedings were abolished, and A could vindicate his Blackacre rights *in rem* only in equity, would they thereby cease to be rights *in rem* and become only rights *in personam*?"

His criticisms of some of Maitland's views are particularly acute, and at the end of the chapter the reader feels that Hohfeld has the better of the argument.

The last chapter of the book contains a reprint of an address delivered by Professor Hohfeld before the Association of American Law Schools on the subject of "A Vital School of Jurisprudence and Law." At the end of his address Professor Hohfeld said:—

"Several years ago I heard Professor William James remark during a public address that the cost of developing and maintaining men like Pasteur and Von Helmholtz was altogether irrelevant in view of the enormous gain to the world as the result of their studies and activities. Of course that remark would apply with equal truth to men like Bentham, Savigny, Von Ihering and other great jurists."

It is certain that, in the future, Professor Hohfeld's name will be included in that list.

A. L. G.

Historical Jurisprudence. By Sir Paul Vinogradoff, F.B.A. Oxford University Press. Humphrey Milford. 1923. 173 pp. (10*s.* 6*d.* net.)

This book is a reprint of the introduction to Sir Paul Vinogradoff's larger work *Outlines of Historical Jurisprudence.* It will be found of particular value by those law students who have not the time to read the whole work, but to whom these introductory chapters will prove to be of the greatest interest.

The Law of Torts. By the Right Honourable Sir Frederick Pollock, Bt., K.C., D.C.L. Twelfth edition. London: Stevens & Sons, Lim. 1923. xlvii. and 718 pp. (32*s.*; for cash 26*s.*)

The most interesting point in connection with the new edition of Sir Frederick Pollock's *Law of Torts* is his criticism of the by now famous case of *Re Polemis and Furness, Withy & Co.* [1921] 3 K. B. 560. In discussing the judgment he says: "I cannot help thinking that too much stress was laid on recent *dicta* of eminent judges which were not strictly necessary for arriving at the results, and too little on the general current of nineteenth century authorities." These words are grateful to the ear of

a reviewer who has attempted during the past year to teach the new theory of liability for the direct consequences of a wrongful act. It is comparatively simple to decide what are the reasonable and probable consequences of an act, but what constitute the direct consequences is a far more difficult question. "The chain of causation" is at best only a metaphor, and like all metaphors it tends to break down when actually applied. What is a *novus actus interveniens* by which the chain of causation can be broken? In the recent case of *Harnett* v. *Bond and Another*, which will have been decided by the Court of Appeal before this review is published, the Judge of first instance held that the failure to do something could not be considered as breaking the chain. In this case Harnett was committed to an insane asylum in 1912. The jury found that he was sane when committed, and that the committal was due to the wrongful acts of the defendants. He was kept in an insane asylum until 1921, when he escaped. During the course of those nine years he was re-certified by other doctors, and also examined at different times. On the point of damages, the question was as to whether or not Dr. Bond and Dr. Adam could be held responsible for the whole nine years of incarceration. In discussing this point the learned judge said: "I cannot regard the decisions arrived at by the different doctors, commissioners, and visitors at the various homes, and the decisions arrived at by the medical superintendent in the same home from time to time, as a fresh intervention which would break the chain of causation. It was nothing of the kind. Moreover, what each doctor did was not to do some act which would injure the plaintiff, but to omit to discover that he had recovered. It was the failure to do something, not the doing of some independent act, that caused the plaintiff's further detention." On the same reasoning, if the superintendent of the insane asylum had negligently omitted to feed the plaintiff, would not the starvation be the direct consequence of the original incarceration? This example is cited to show how difficult it is to decide when a chain of causation is broken.

Apart from the difficulty of working the "direct consequences" rule, it does not seem to be based either upon justice or reason. The plaintiff who has been injured by a tort naturally desires to be indemnified for all the damage he has suffered, whether the damage be reasonable and probable, direct or indirect. From the standpoint of the defendant justice demands that he should only pay for those injuries which he could reasonably have anticipated. The direct consequence theory falls between these two possible positions. It does not satisfy the plaintiff and it is unfair to the defendant.

Sir Frederick Pollock also mentions, without discussing at length, the case of *Sorrell* v. *Smith* [1923] 2 Ch. 32. This case has since been reversed in the Court of Appeal. It is probable that it is going to the House of Lords. When it is finally decided, the uncertainty surrounding the law of civil conspiracy will, perhaps, be solved.

All the important recent cases have been included in the new edition, which will continue to be the standard work on this subject.

A. L. G.

A Compendium of Mercantile Law. By JOHN WILLIAM SMITH. Twelfth edition, by J. H. WATTS. London: Stevens & Sons, Lim. 1924. lxvii. and 956 pp. (£2 2*s.* net.)

IN 1925 the new conditions governing the course for the LL.B. degree at Cambridge University will come into force. It is probable that a course dealing primarily with commercial law will be included in the schedule. Smith and Watts' *Compendium* will prove a useful, although voluminous, text-book.

In writing a book on mercantile law, one of the major difficulties consists in subordinating each part to the scheme as a whole, and, as the editor says, "keeping each subject within the limits of space fairly assignable to it." The one hundred and two pages given to maritime insurance seem disproportionately large when compared with the ten pages given to "sole traders." These ten pages could be expanded with great advantage. In them the author includes such varied subjects as the definition of "trader," contracts in restraint of trade, contracts of aliens, infants, married women, and clergymen.

There is one statement at the beginning of the book which is misleading: On page 3 we read that "Lord Holt introduced into English law, in *Coggs* v. *Bernard*, the whole Roman law of bailments; what he did on a large scale has often been done indirectly and less extensively." It is true that Lord Holt tried to introduce the Roman law of bailment, but his classification has never been accepted.

On page 93 the author says: "A Joint Stock Company (established before the passing of the enactments presently mentioned, and which has not adopted their provisions) is a partnership consisting of a large number of members, whose rights and liabilities would be precisely the same as those of any other sort of partners, had not their multitude obliged them to adopt certain peculiar regulations for the government of the concern, which are ordinarily contained in an instrument called a Deed of Settlement." The author does not make it sufficiently clear that this definition does not apply to companies formed and registered under the Companies (Consolidation) Acts, 1908-1917. To suggest that a corporation is a partnership with special regulations is to put a dangerous pitfall in the path of the unwary student.

The more important recent cases have all been cited by the editor. The reference to the important case of *Folkes* v. *King*, 1922, is, however, inadequate. The chapter on principal and agent, although necessarily comprised within a narrow compass, is the clearest we have ever read upon this difficult topic.

A. L. G.

The Expert Witness. By C. A. MITCHELL, M.A., F.I.C. Cambridge: Heffer's. 1923. xv. and 188 pp. (7*s.* 6*d.* net.)

THIS book is as interesting as the best detective story. The author not only knows his subject thoroughly but writes in a style which makes every one of his points count. His summaries of the various cases which he quotes are models of lucidity and brevity.

In a comparatively short compass the author deals with a large number of topics. In his chapter on "The Evidence of Identity" he discusses the *Slingsby*, *Russell* and *Beck Cases*. The *Will West Case* from America is

almost incredible, and is made doubly interesting because of the excellent photographs which the author publishes. His chapter on "The Identification of Skin Prints" deals with a difficult subject in a clear and convincing manner. This is the only part of the book which could be materially improved. Without greatly increasing the length of the chapter the author could include a statement as to how finger prints are actually classified and distinguished. The chapters on "Medical Evidence" and the "Evidence of the Chemist" naturally include material which is not original, as most of the cases which the author quotes are already famous in criminal annals. The chapter on "Documentary Evidence," however, is the best of its kind that the present reviewer has ever read. The illustrations given are particularly valuable. After studying the evidence produced by the author, one's confidence in the handwriting expert is restored. As the author points out, the original claim of infallibility made by handwriting experts when this science was first developed, did much to bring it into disrepute. His last chapter deals with expert evidence and history. In this he discusses Mr. F. Chamberlin's recent book *The Private Character of Queen Elizabeth* and the much discussed "Scandal letter" which Mary, Queen of Scots, is said to have written to Elizabeth in 1586. If the method of writing history which he advocates is adopted in the future, then the present biographical style of Mr. Lytton Strachey will become obsolete.

A. L. G.

Mozley and Whiteley's Law Dictionary. Fourth edition. By F. G. Neave, LL.D. London: Butterworth & Co. 1923. (10*s.* 6*d.* net.)

The chief value of a law dictionary consists in the accuracy of its definitions. It is difficult to achieve this is the short space of 345 pages. It is not surprising, therefore, that the authors and editor of the present volume have not proved more successful.

To take only a few definitions at random:

Crime is defined as: "A crime, as opposed to a civil injury, is the violation of a right, considered in reference to the evil tendency of such violation, as regards the community at large."

Professor Kenny in his *Outlines of Criminal Law* has conclusively shown that this definition is incorrect. His definition of a crime is as follows: "A crime is a wrong whose sanction is punitive and which is remissible by the Crown if remissible at all."

Negligence is defined as "A culpable omission of a positive duty." As Sir John Salmond has pointed out, a culpable omission need not be negligent at all, but may be intentional.

Ownership and *Owner* are completely omitted.

Duty is not defined, although its correlative *right* is described as follows: "A lawful title or claim to anything. The word is frequently used to denote a claim to a thing of which one is not in possession."

In discussing the *Year Books* the authors say: "They were taken down by the protonotaries, or chief scribes of the courts, at the expense of the Crown, and published annually, whence they were known under the denomination of *Year Books*." It would be interesting to hear Mr. Bolland's views on this statement.

The book also contains some references which are not definitions and have no place in a dictionary. Thus *Security for Costs* is dealt with as follows: "As to the cases in which security for costs is now required, see R. S. C. 1883, Ord. LXV. r. 6, and the notes thereon in the *Yearly Practice.*"

A careful revision would make this book a valuable one to law students, as a legal dictionary, which is both accurate and of convenient compass, is badly needed.

A. L. G.

A Guide to the Rent and Mortgage Interest Restrictions Acts, 1920-1923. Third edition. By W. E. Wilkinson, LL.D. (Lond.). London: The Solicitors' Law Stationery Society, Lim. 1923. xx and 212 pp. (7*s.* 6*d.*)

The fact that three editions of this book have been called for within three years is sufficient evidence of its value to the legal profession. The author has brought his exposition of these Acts up to date by including citations of all the more important cases decided within the last year. His summaries of the various cases have not been done in a hurried manner, but are excellent statements of the points at issue; for example, on page 9, his summary of the important case of *Wilkes* v. *Goodwin* [1923] 2 K. B. 86, is a model of its kind:

"Bankes and Scrutton, L.JJ., held that unless the furniture for the use of which payment was made was so trifling in value or amount as to be negligible, the dwelling-house was thereby taken out of the Act of 1920. Younger, L.J., on the other hand, held that it was taken out of the Act by payment for the use of furniture only where the amount of furniture was such as to require the judge to say that the house was no longer an unfurnished house."

Three Criminal Law Reformers. By Coleman Phillipson, M.A., LL.D., Lit. D. J. M. Dent & Sons, Lim. London and Toronto. xvi and 344 pp. (18*s.* net.)

We have lately been innundated with books on various aspects of criminology. Reminiscences of Court officials, interesting but not instructive; books on criminal psychology, serving only to expose the weird psychology of their authors; and books on prison reform written by Communists and conscientious objectors with huge axes to grind. After all these trials it is a relief to meet with a book that is really useful.

The author sets out to sketch in three essays the lives and work of the three of the great pioneers of criminal law reform, Beccaria, Bentham and Romilly. Each essay is divided into four parts, in which he discusses the reformer's life; the nature of the age in which he lived and his relationship to it; his doctrines; and his influence and achievements. The essays have to be taken together, for, though they are about three reformers, they refer to the same period, perhaps the most important period in the history of legal reform. But the link between these men is not historical only; each owed much to the others, and they all owed much to the French philosophers and reformers of the time—a debt which they all willingly acknowledged.

The author has kept discreetly in the background. He has done what is so rarely accomplished in books of this description, he has given us the views of the reformers without drowning them in a deluge of his own opinions.

There is no unnecessary commentary. The work is not only a history of the reform movement of the period, but it is also a usefully arranged synopsis of the opinions of the leading reformers. In respect to Bentham, a prolific writer with an obscure style and a taste for very involved classification, it is especially useful.

In a book planned in the manner of this one a certain amount of repetition is unavoidable. We think, however, that the author has carried this too far; he has been too anxious to make certain points and impress them on his reader. His glowing admiration of Beccaria, for instance, causes him to reiterate over and over how remarkable it was that so young and inexperienced a man should have produced so valuable a treatise as the *Dei Delitti*. After all, Beccaria moved in a group of men whose opinions must have furnished him with much of the material for his treatise. Perhaps his was more the art of clear expression than of original thought; his failure to hold his own in the company of the French philosophers might be some indication of lack of originality.

A very useful book, and the publisher has given it worthy printing and binding. We hope and anticipate that the author will turn his clever pen and useful gift of analysis to some of the more modern reformers of the criminal law, Lombroso for instance, and make them more available to the general reader.

H. B.

An Analysis of the Eighteenth Edition of Snell's Principles of Equity, with Notes Thereon. Twelfth edition. By E. E. Blyth, B.A., LL.D. (Lond.). London: Sweet & Maxwell, Lim. 1923. xx and 262 pp. (10*s.* 6*d.* net.)

The twelfth edition of an analysis of the eighteenth edition of another book obviously does not need an extended review. Mr. Blyth's short volume remains an accurate and valuable summary of one of the great legal text-books. It will be found of particular value by the student who wishes to refresh his memory before entering upon an examination.

A Summary of the Law of Companies. Thirteenth edition, by William Higgins. By T. Eustace Smith. London: Sweet & Maxwell, Lim. 1923. xxiii and 360 pp. (7*s.* 6*d.* net.)

This book has been found of particular value by students who are planning to become either solicitors or chartered accountants. It is written entirely from the practical standpoint and contains virtually no discussion of the various questions of theoretical importance connected with company law. Thus, no mention is made of the frequently debated question of *ultra vires* torts. This simplification of the book is intentional and makes it especially suitable for the purpose for which it is intended. The present

editor has brought it up to date by including a large number of new and important citations. Perhaps one of the most useful features of this book from the standpoint of the student is the collection of questions given at recent examinations of the Institute of Chartered Accountants and of other examining bodies which the editor has included at the end of the book.

Treatise on the Conversion of a Business into a Private Limited Company. Fourth edition. By CECIL W. TURNER. London: Solicitors' Law Stationery Society, Lim. 1922. 232 pp. (10*s.* net.)

THE purpose of this book is to make clear to the layman the principal steps which are required to convert a business into a private limited company. It is written in so clear and careful a style that the ordinary reader can get an accurate conception of the advantages and principal obligations connected with such a proceeding. The book does not contain references to cases and authorities, as it was not the purpose of the author to compete with the leading text-books on company law. Some writers feel that it is not necessary to be accurate when writing a legal book which is to be used primarily by non-lawyers. Fortunately, the author of the present volume does not take that view of the matter. In the present edition he has been careful to include a statement of most of the important changes of the law since 1913.

The Law of Negotiable Securities. By WILLIAM WILLIS. Fourth edition, by ALFRED WILLIAM BAKER WELFORD. London: Sweet & Maxwell, Lim. 1923. x and pp. 190. (10*s.* net.)

THIS book has the advantage which is often found in a volume based upon lectures: it is essentially readable. The present editor has, therefore, been well advised to leave the original text as far as possible unaltered. He has found it necessary to cite only twelve new cases which have been decided since these lectures were delivered more than a quarter of a century ago. This is not surprising in view of the fact that the law of negotiable securities is to a large degree settled and beyond dispute. The only material change that the editor has made is in the inclusion of two and a half pages (pages 33-35), in which the cases of *Goodwin* v. *Robarts, Crouch* v. *Crédit Foncier Co., Bechuanaland Exploration Company* v. *London Trading Bank,* and *Edelstein* v. *Schuler & Co.,* are discussed at length.

"Law Notes" Year Books, 1921—1924. By the Editors of *Law Notes*. Law Notes Publishing Offices. (10*s*. 6*d*. net.)

This alphabetical digest of the chief statutes, rules, orders, and cases of each year bids fair to become a hardy annual. It should be very popular with both students and practitioners, as a book of ready reference in a small compass and at a very reasonable price. This book can safely be recommended to librarians who cannot afford to purchase the full law reports. The law schools in the colonies and in America will be well advised in adding this volume to their list.

The Law and Procedure Relating to Bastardy Orders. By A. M. Lyons. Stevens & Sons, Lim. xii and 71 pp. (5*s*. net.)

This monograph will probably be found useful by newly-appointed justices of the peace as giving them a preliminary survey of one of the branches of the law which they will be obliged most frequently, and find most difficult, to apply. A new edition would be improved by some revision of the style: for instance, the wording of the first paragraph on page 15 suggests that in the case there cited the complainant was hearing the application. Those sections of the Bastardy Laws Amendment Act, 1872, and other relevant Acts, which are now in force should either be collected at the beginning of the appendix, or be printed in the body of the book as the text upon which the author's commentary is written. It is unsatisfactory that in the most interesting part of the book, that dealing with corroboration, which begins on page 15, the reader does not discover that the matter is governed by statute until page 20, when he comes upon a reference to section 4 of the 1872 Act in an extract quoted from a judgment of Lord Reading.

These defects in the book are easily remedied: the opportunity for doing so will, we think, be ensured by the commercial success to which its merits entitle it.

The Law of Partnership. By Strahan & Oldham. London: Sweet & Maxwell, Lim. (10*s*. 6*d*. net.)

This is the third edition, by Mr. Strahan, of an old favourite. It is an excellent presentation of the law in a small compass, and, as goes without saying, the noting-up of recent decisions has been accurately done.

Principles of the Law of Contract. By E. H. Goodman Roberts. Stevens & Sons. (10*s*.; for cash 8*s*.)

To write an intelligent book on the law of contract in one hundred and forty-two pages, which includes fourteen on agency and twenty-three on negotiable instruments, is not an easy task, and we congratulate Mr. Goodman Roberts on the result of his attempt. A student would derive much benefit from mastering this little book before proceeding to something larger. It is obviously the product of original study of the authorities,

and not a mere borrowing of the work of others, as short books are apt to be. In particular, the author, without leaving the beaten track merely for the sake of doing so, has made use of a number of decisions which are not conventionally cited in text-books on the law of Contract, and so given his work a welcome air of freshness. A. D. McN.

How to Become a Solicitor. Second edition. By Gibson & Weldon. London: Law Notes Publishing Offices. 1923. 76 pp. (4*s.* 6*d.* net.)

The second edition of this excellent little book has been made necessary by the Solicitors Act, 1922. It will be found of considerable value by all college tutors who have to advise their students as to the choice of their future profession. It will also be of great interest to the members of the American Bar Association who will be visiting England in July. Foreigners have always found it difficult to understand the difference between barristers and solicitors, and the present book, together with its companion volume *How to Become a Barrister*, will do much to make clear the distinction between the two branches of the profession.

An Analysis of Williams on the Law of Personal Property. By A. M. Wilshere, M.A., LL.B. Fourth edition. Sweet & Maxwell, Lim. (7*s.* 6*d.* net.)

The fact that a fourth edition of this useful analysis has been called for is a sufficient testimony to its merits. We can cordially recommend it as a great assistance to students in reading the larger work. It is natural that the desire for brevity in a work of this kind occasionally involves inaccuracy. Thus, to state that equitable interests in chattels are "generally of the same nature as equitable estates in land" (page 4) is apt, without qualification, to be misleading. A similar criticism may be applied to a passage on page 78, "In modern times, if personalty was given to A for life with remainder to B, the Court of Chancery considered that A had merely a life interest and that B had a vested interest in remainder, and it would compel A to make good the disposition."

D. T. O.

The Historical Foundations of Modern Company Law. By Ronald Ralph Formoy, LL.B., Tutor to the Law Society, of the Inner Temple, Barrister-at-Law. 1923. Sweet & Maxwell, Lim. (10*s.* 6*d.* net.)

This is a conscientious piece of work, and Mr. Formoy may be congratulated on producing, within the limits he has set himself, a compact and entertaining introduction to the modern law of joint stock companies. We recommend the perusal of this book in place of the somewhat arid introductions to be found in text books on company law. There is a curious printers' error at page 45. Although a ship is usually referred to as of the female sex, we have not hitherto seen this applied to a partner-ship.

D. T. O.

The Law of Carriage by Railway. By Henry W. Disney. Sixth edition. 1923. London: Stevens & Sons, Lim. 8vo. xix and 332 pp. (12*s.* 6*d.* net.)

In the *Cambridge Law Journal*, vol. 1, page 242, we reviewed the fifth edition of Mr. Disney's hand-book, and now the succeeding edition is placed before us.

The seeds sown by the Railway Act, 1921, must ripen quickly, and will inevitably produce a crop of cases, *e.g.*, upon statutory forms relating to conditions of carriage (sections 42 to 45). The whole basis of railway organisation and control has undergone radical alteration. Under such circumstances we may expect another edition of the *Law of Carriage* within an equally short space of time.

The characteristics of the book may be summed up in the terms—reliable, accurate, and comprehensive. The volume still retains some of its original non-technical complection, and this makes it most readable for students.

Doubtless it is desirable to keep the book within reasonable compass, but some few important cases deserve more attention, especially, as we have said before, *Clarke* v. *West Ham Corporation* [1909] 2 K. B., 858, which surely decided more than that a railway company cannot limit their liability for a passenger's safety by carrying him at a fare below the legal maximum and giving him notice of this condition, unless they offer to carry him at full liability for a higher fare. Since this book was published it has been held that even if a passenger agrees that the railway's liability for personal injury should be limited, such agreement does not confine the amount of damages recoverable by his dependents under the Fatal Accidents Act, 1846: *Nunan* v. *Southern Railway Company* [1924] 1 K. B., p. 223.

A. E. R.

The Outlines of Procedure. By A. M. Wilshere, LL.B. Third edition. 1923. London: Sweet & Maxwell, Lim. xiv and 188 pp. (11*s.* 6*d.* net.)

Mr. Wilshere's little book is anything but a "cram" book in the style which professors and teachers of law live to hate.

It suffices for the procedure part of the procedure and evidence paper in the Bar Final, and is especially useful to those University students who, after taking their Tripos, sit for the Bar Final in the term following the Long Vacation.

The information contained is accurate and well arranged, and it forms a good introduction to the more ample treatises, with which it does not profess to compete.

Evidence is a difficult subject, and one of which it is essential to obtain a firm grasp. In achieving this end a study of Wilshere is a real aid.

If we may venture a suggestion, in our opinion the book could be made doubly useful to both University and Bar students if the section on evidence—now restored in this edition—were amplified and made to include evidence in both civil and criminal proceedings.

A. E. R.

Rent and Mortgage Interest Restrictions. By the Editor of *Law Notes*. Law Notes Publishing Offices. xvi and 183 pp. (Price, cloth, 5*s*. net.)

No one would be so bold as to assert that he could walk with safety through the labyrinth of unsystematic legislation contained in the Rent Restriction Acts, without some trusty guide. This guidance the editors of *Law Notes* well know how to supply, especially for those members of the Junior Bar whose apprenticeship is being served in the County Court.

The Court of Appeal differed from the view expressed by the Divisional Court, and adopted by the authors at pages 83 and 84 upon the position and rights of a "statutory" tenant. Such an one has a personal non-assignable interest: *Keeves* v. *Dean*; *Nunn* v. *Pellegrini*, 40 T. L. R., page 211; whether he can sub-let or devise his interest is still open.

For the effect of the Act of 1923 (Notice of Increase), see *Landrigan* v. *Simons* (1924) W. N., page 10.

If the controversial Bill, at present in Committee, becomes law there will be a call for yet another edition of this useful *vade-mecum*.

A. E. R.

The Law Relating to Fixtures. By Benaiah W. Adkin, Vice-Principal of the College of Estate Management, and of the Middle Temple, Barrister-at-Law; and David Bowen, of Lincoln's Inn and North-Eastern Circuit, Barrister-at-Law. London: The Estates Gazette, Lim. 1923. 8vo. xliv and 403 pp. (15*s*. net.)

This book will be of great use to all lawyers who have to deal with the subject of fixtures. A new work on the subject has long been wanted, for nothing dealing with it adequately appears to have been published for nearly forty years. During this period not only have considerable changes in the law been effected by statutes, such as the Agricultural Holdings Act, 1908, but judicial interpretation has shown that there has been further development in the definition of a fixture; gradually the apparent intention of the party attaching an article is being substituted for the mode of attachment as the chief consideration in deciding whether an article is a fixture or not.

The subject is not intrinsically difficult; but the present state of the law is far from clear. This is largely due to an unexpected lack of clear thinking in the past on the part of some judges. In the first place, it seems that misunderstandings have resulted from the use of the word "fixture" in different senses without definition; secondly, the question whether an article is or is not a fixture has often been confused with the question whether a fixture is in the circumstances lawfully removeable. Further difficulty has arisen from the varying importance attributed to the tests which have been adopted, such as the mode of attachment, the effect on the enjoyment and value of the freehold, and the apparent intention or to the length of time during which such attachment is to continue. The result is that on many points there appear to be conflicting decisions.

In these circumstances the authors have wisely devoted much care to definitions and a logical consideration of the questions which arise. In dealing with the questions themselves, the few principles as to which there

is no doubt are lucidly stated, with full references to the authorities. For the rest, the question as to whether an article is a fixture is considered to be a question of fact in each case; and the first aim has accordingly been to give the facts of or references to decided cases. The authors have generally been content to supply the reader with the material necessary for a proper consideration of the case with which he may have to deal; and in this they have undoubtedly been successful. Great care and diligence in the examination of the decisions of the Courts are evident, and the arrangement of the book makes it an easy matter to find the information required. The only adverse criticism to be made in this respect is that further help might have been given by more detailed consideration of the apparent conflict between certain decisions of the Courts and by deductions as to the respective values of those decisions.

The introductory chapter is in some respects misleading in its attempt to give a simple statement of what has unfortunately become exceedingly complicated. The book is, however, of undoubted value to lawyers, and the preface too modest in introducing it mainly as a text book for students of estate management.

It should be added that the value of the work is enhanced by the completeness of the indices, and by the appendices in which the material statutes are set out.

B. F. M.

The Law and Practice under The Companies Acts. Containing the statutes and the rules, orders and forms to regulate proceedings. By the Rt. Hon. Lord Wrenbury, P.C., M.A., formerly Lord Justice Buckley. Tenth edition, by W. Gordon Brown, B.A., LL.B., of Lincoln's Inn, and R. J. T. Gibson, M.A., LL.M., of the Inner Temple, Barristers-at-Law. London: Stevens & Sons, Lim. 1924. La. 8vo. xci, 865 and cviii pp. (£2 10*s.* net.)

This work has for half-a-century been well known, under the name of *Buckley on the Companies Act*, as the standard work on the subject; a new edition is therefore very welcome to all company lawyers. This edition is the first which has not been prepared by the eminent author, but the new editors have fully maintained the high standard of the previous editions. The last edition was published in 1909, soon after the passing of the Consolidation Act, so that the task of considering all the cases decided under that Act has fallen on the new editors. It is interesting to notice that the decisions in such cases have not disclosed any serious flaw in the Act nor involved any great change. It has been possible, therefore, to follow the lines of the previous editions. These are so well known that it is not necessary to give any details; it is sufficient to state that in addition to useful notes on these cases, and to the insertion of more complete cross references, the new editors have cured the chief defect of the previous editions by compiling a new and enlarged index. There can be no doubt that this edition will be found to be of even greater value than past editions.

B. F. M.

The Rent Restrictions Acts, 1920—1923. Being a treatise on the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, as amended by the Rent Restrictions (Notices of Increase) Act, 1923, and the Rent and Mortgage Interest Restrictions Act, 1923. By THEODORE JOHN SOPHIAN, B.A. (Oxon), of the Inner Temple, Barrister-at-law, etc. London: Stevens & Sons, Lim. 1923. 8vo. xxvii and 280 pp. (*7s. 6d.* net.)

THE author of this treatise is not lacking in courage. He has set himself the task of bringing order out of the chaos of the Rent Acts; and he has not been content merely to consider the decisions which relate to the subject, and to offer an annotated edition of the statutes. His purpose is to expound the law on the subject and to show the effect of the acts, rather than to explain the sections. His method is, therefore, to deal with the matters to which the Acts relate, in their logical sequence, in narrative form, without regard to the order in which they are dealt with by the Acts. The statutes are set out in the appendices; in the text there are only references to the relevant sections.

There can be little doubt that the author has succeeded in his aim, and that the method employed has enabled him to give a consistent and ordered view of the law on the subject. Yet it is doubtful whether, from the point of view of the practitioner, the best method has been employed. The subject is not like one which depends mainly on the common law, illustrated by decisions of the Courts; in this case the statutes purport to be almost a code on the subject. The main requirement in practice is, therefore, aid in the construction of the sections of the statutes in the light of decisions and other sections, so that an edition of the Acts well annotated and with complete cross references would really be more convenient. It is only fair, however, to add that the treatise is excellently indexed, and that the special index goes far to remedy any defects in this respect.

With regard to the substance of the treatise, the author is to be congratulated. The subject is dealt with most lucidly, and great care and industry in the examination of cases are evident. The matter has been well handled, and there is little which calls for adverse criticism. The statement on page 5, however, that the policy of the Act is not to affect agreements made prior to the Act and at a time when the parties to the agreement could not fairly have had the Act in contemplation, appears to be contradicted by the decision in *Michael* v. *Phillips* [1924] 1 K. B. 16, which has not been considered in this connection. It appears also that the decision in *McIlroy* (*William*), *Lim.* v. *Clements* (1923) W. N. 81 & 149, has been quoted somewhat inaccurately on page 8. Surely the basis of the judgment in that case is that an option to renew is not, in general, a term of the statutory tenancy, but that a tenant holding over under the Acts has the right to exercise the option, because he is in this respect in the same position as a tenant holding over at common law, and can therefore exercise the right, as a right under a collateral agreement, subsisting, unless abandoned, so long as he is in fact in possession.

It is to be noted that, since the publication of the treatise, the question discussed on page 68, as to reduction of rent in the event of reduction of rates, has been decided in *Strickland* v. *Palmer* (1924) W. N. 68. On the other hand in *Keeves* v. *Dean* (1924) W. N. 6, the Court of Appeal have

not only reversed the division of the Divisional Court and held that the assignee of a statutory tenant is not protected by the Acts, but have re-opened the question of the effect of a sub-letting by a statutory tenant. It would seem, however, that the decision in *Keeves* v. *Dean* affords no reason to doubt the correctness of the previous decisions on this point.

B. F. M.

Russell on the Power and Duty of an Arbitrator, and the Law of Submissions and Awards and References under Order of Court. With an appendix of forms, precedents, and statutes. Eleventh edition. By W. Bowstead, of the Middle Temple, Barrister-at-Law, &c. 1923. London: Stevens & Sons, Lim.; Sweet & Maxwell, Lim. La. 8vo. lxiv and 795 pp. (£2 2*s*. net.)

In the preparation of the tenth edition by Mr. Alfred A. Hudson, K.C., published in 1919, Mr. Bowstead took a prominent part in re-arranging and re-writing the work. The appearance of the present edition within about four years is a sufficient indication as to the steady demand for this well-known and leading authority on the subject.

Since the publication of the tenth edition, the most important legal changes in the law on this subject have been effected by the Acquisition of Land (Assessment of Compensation) Act, 1919, and section 16 of the Administration of Justice Act, 1920. The first-mentioned Act, the main object of which was to secure that not more than reasonable compensation should be paid for land compulsorily acquired for public purposes, laid down new principles for the assessment of such compensation, and provided for the appointment of official arbitrators with fixed salaries, paid by the State, by whom all claims for compensation for land so acquired are, unless it is otherwise agreed between the parties, to be determined.

Section 16 of the Administration of Justice Act, 1920, in effect extends the provisions of section 6 of the Arbitration Act, 1889, to cases where the reference is to three arbitrators, one to be appointed by each party and the third by the two arbitrators so appointed.

A new code of rules with respect to appeals from decisions of official and special referees is provided by Order LIXa. of the Rules of the Supreme Court.

These new matters are incorporated in this new edition, which also includes the principal decisions on the subject since the last edition was published. The work has thus been brought up-to-date. The re-arrangement, following generally the order of the sections of the principal Act, but dealing separately with references by consent and references under Order of Court, has been retained.

The general excellence of this work makes it a difficult matter to criticise it in any respect, but the following matters might, with advantage, be considered in future editions:

The question sometimes arises whether a claim to set aside a contract is within the usual arbitration clause whereby disputes or differences arising out of the contract or as to its construction or effect shall be settled by arbitration. There can be no doubt as to the answer, but the discussion on pp. 95 *et seq.* appears to be a little inconclusive.

On p. 143, there occurs the following passage:—"A refusal (by the arbitrator) to take the examination (of witnesses) on oath, when requested by one of the parties to do so, will not invalidate the award." The learned editor cites *Smith* v. *Goff* (1845), 14 M. & W. 264, as authority for this. The cases of *Ridout* v. *Pye* (1797), 1 Bos. & Pul. 91; *Allen* v. *Francis* (1845), 9 Jur. 691; *Smith* v. *Sparrow* (1847), 4 D. & L. 604; *Biggs* v. *Hansell* (1855), 16 C. B. 562—cited on pp. 142, 143, in this connection—appear to have been decided on the ground that the parties by raising no objection to the witnesses not having been sworn, or proceeding with the examination after objection, had impliedly waived their right of objection. These cases, as also the case of *Wakefield* v. *Llanelly Rail. & Dock Co.* (1864) 34 Beav. 245—also cited on p. 143—appear to support the view that *Smith* v. *Goff* should be treated as an exceptional case, and not as authority for a rule in the above terms.

Again, the decision in *Anderson* v. *Wallace* (1835) 3 Cl. & F. 26—cited on p. 408—suggests that the passage contained on p. 404, that: "Both sides must be heard, each in the presence of the other. However immaterial the arbitrator may deem a point to be, he should be very careful not to examine a party or a witness upon it, except in the presence of the opponent. If he errs in this respect, he exposes himself to the gravest censure and the smallest irregularity is often fatal to the award," needs qualification.

D. B.

The Law of Income Tax. By E. K. Konstam, K.C. Second edition. London: Stevens & Sons, Lim.; and Sweet & Maxwell, Lim. 1923. La. 8vo. lv and 579 pp. (37*s.* 6*d.* net.)

Mr. Konstam sets out in this book "to provide a continuous and self-contained account of the law of income tax," a task which, having regard to the absurdly unsatisfactory state of the legislation on the subject is one of no small difficulty.

The first edition of the book has proved sufficiently popular, in spite of the multiplicity of similar works, to be exhausted in little over two years, and the present edition more than maintains the standard of its predecessor. It incorporates the Acts of 1921, 1922 and 1923; and an appendix which should prove useful has been added on Dominion Income Tax.

Mr. Konstam's experience peculiarly fits him for the task which he has undertaken, and it is impossible not to admire the skill with which he treats a heterogeneous and not always consistent body of case and statute law. His book is lucid, continuous nad well arranged; his style is readable and not too technical even for the lay reader; and the general get-up of the book is entirely satisfactory. It is difficult to criticise, but if we may offer a suggestion it would be that Schedule B might be more fully treated in future editions. The indexing is good and the references from the text to the statutes (all of which are printed in full) greatly increase rapidity of reference. Similar references from the statutes to the pages of the text where the different sections are treated would be useful.

We should like to take this opportunity of endorsing Mr. Konstam's view as to the increasingly pressing need for a clarifying Act. That the most eminent legal minds of the country should be able to disagree as to the effect of statutes which so nearly affect the pockets of many of His Majesty's subjects is a state of affairs which should not be allowed to continue.

J. A. W.

Books also received: —

The Law of Stamp Duties on Deeds and other Instruments. Seventeenth edition. By E. N. Alpe. Revised and enlarged by Arthur Reginald Rudall. With notes on Practice. By Herbert William Jordan. London: Jordan & Sons, Lim. 1923. xxxviii and 385 pp. (15*s.* net.)

Handbook giving Tables of Estate, Probate, Stamp and Companies' Duties and Registration Fees in Various Offices, with Notes as to Forms and Official Requirements. By T. A. Seabrook. London: The Solicitors' Law Stationery Society, Lim. 1922. 64 pp. (5*s.*, or by post 5*s.* 5*d.*)

The Law of Trade Mark Registration. Second and enlarged edition. By the Author and F. E. Bray, M.A., M.C., and J. Q. Henriques, B.A. By Lewis Boyd Sebastian, B.C.L., M.A. London: Stevens & Sons, Lim. 1922. xxxvi and 267 pp.

New System of Book-keeping for Solicitors. By Lewis E. E. Emmett. London: The Solicitors' Law Stationery Society, Lim. 1923. 54 pp. (4*s.* 6*d.* net, or by post 5*s.*)

The Rent Restrictions (Notices of Increase) Act. 1923. By Theodore John Sophian, B.A. (Oxon). London: Stevens & Sons, Lim. 1923. 24 pp. (1*s.* 6*d.* net.)

Leading Cases on Rent Restriction. By Alexander Cairns. London: Stevens & Sons, Lim. 1923. (5*s.* net.)